The liability of the owners and the liability of the ship commence at the same moment, and it will attach on delivery of the goods to the owner's servants alongside of the vessel: *British Columbia Saw Mill Co.* v. *Nettleship*, L. R., 3 C. P. 499; *The Edwin, supra;* 2 Pars. on Ad. and Ship. 252; Angell on Carriers 129, 148. Although of course neither owner nor ship will be liable if the delivery be made without any previous contract to a servant who has no authority, either apparent or real, to receive them: *Trowbridge* v. *Chapin*, 23 Conn. 595; *The Keokuk*, 9 Wall. 517.

THEODORE M. ETTING.

Philadelphia.

(*To be Continued.*)

RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

VAN VOORHIS *v.* BRINTNALL ET AL.

The general rule that a contract, valid by the law of the place where it is made, is valid everywhere, includes the contract of marriage.

To this rule, as regards marriage, there are exceptions, first, of incest or polygamy coming within the prohibitions of natural law; and second, of prohibition by positive law.

While laws may have an extra-territorial effect, so far as to affect a citizen subject to them for acts done outside the state, yet such effect is exceptional, and a statute imposing a personal disqualification will not be construed to extend to acts done beyond the state, unless it contains express words to that effect.

The provision of the statute prohibiting a respondent divorced for adultery from marrying again is a penalty and has no extra-territorial effect.

A man divorced by the courts of New York for adultery, and therefore prohibited from marrying again, went to Connecticut with the intent to evade that prohibition, married and immediately returned to New York. *Held*, that the marriage was valid.

THIS was an action to determine the rights of the parties under the will of Elias Van Voorhis.

Barker Van Voorhis, a son of testator, was divorced from his wife in 1872, by a decree of the Supreme Court of New York, by which he was prohibited from marrying again. In 1874, being

still domiciled in New York, he and Ida Shraeder, also a citizen of New York, went to Connecticut and were duly married under the laws of that state. On the same day the couple returned to New York and remained domiciled there till the death of Barker in 1880. It was found as a fact by the court below, that they had gone to Connecticut for the purpose of evading the New York law. The plaintiff in error, Rose Van Voorhis, was the child of this marriage, and the question was whether she was a legitimate child of Barker, and therefore entitled to share under the will of her grandfather, the testator.

D. M. Porter, for appellant.

C. W. Stevens and *R. Busteed, Jr.*, *contra.*

The opinion of the court was delivered by

DANFORTH, J. [After stating the facts.] The question involves the civil status acquired by Barker Van Voorhis and Ida by the marriage in Connecticut. First. It is a general rule of law, that a contract entered into in another state or country, if valid according to the law of that place, is valid everywhere (*The King of Spain* v. *Machado*, 4 Russ. 225; *Potter* v. *Brown*, 5 East 130; Story Conflict of Laws, sect. 242); and this, says KENT, 2 Com. 454, is *jure gentium*, and by tacit assent; and Lord BROUGHAM, in *Warrender* v. *Warrender*, 2 Cl. & Fin. 529, 530, declares that the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate* but *ex debito justitiæ;* and, according to the case in hand, the rule recognises as valid a marriage considered valid in the place where celebrated: Story Conflict of Laws, sects. 69, 79; *Connelly* v. *Connelly*, 14 Jur. 437. "We all know," says the court in that case, "that in questions of marriage contract, the *lex loci contractus* is that which is to determine the status of the parties," and also declares that this, by consent of all nations, is *jus gentium*. In *Dalrymple* v. *Dalrymple*, 2 Hagg. 54, it was held that a marriage good in Scotland, though otherwise by the laws of England, is valid in that country; and this was put upon the ground that the rights of the parties must be tried by reference to the law of the country where they originated. In *Scrimshire* v. *Scrimshire*, 2 Hagg. 395, the same principle is stated in different words. The

court says: "All parties contracting gain a forum in the place where the contract is entered into:" *Warrender* v. *Warrender*, *supra*; *Lacon* v. *Higgins*, Don. & R. N. P. C. 38; *Butler* v. *Freeman*, Amb. 303. Not only is this the result of English decisions, but is believed to state the principle upon which the courts of many of our sister states have acted: *Greenwood* v. *Curtis*, 6 Mass. 358; *Medway* v. *Needham*, 16 Id. 157; *Parton* v. *Hervey*, 1 Gray 119; *Putnam* v. *Putnam*, 8 Pick. 433; *Dickson* v. *Dickson*, 1 Yerg. 110; *Stevenson* v. *Gray*, 17 B. Mon. 193; *Fornshill* v. *Murray*, 1 Bland Ch. 479, and by which our own with few exceptions, have been governed. In *Decouche* v. *Savetier*, 3 Johns. Ch. 210, Chancellor KENT says: "There is no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*." In *Cropsey* v. *Ogden*, 11 N. Y. 228, JOHNSON, J, says: "By the universal practice of civilized nations, the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated." The court had before it the case of one who, having a former wife living, from whom he then had been divorced for adultery by him committed, married a second time in this state. His last marriage was held to be void under our statute prohibiting a second or other subsequent marriage by any person during the lifetime of any former husband or wife of such person. Here the former marriage, his adultery and the existence of his first wife, established the condition or quality of the man. They were facts in his history, and brought him within the terms of our law. The general rule above stated was applied. The *lex loci* governed. But the court said it was not necessary for them to consider what would have been the effect of a marriage celebrated out of this state. Its attention was, however, directly brought to the statute relating to marriages, and the circumstances under which the remarks above quoted, and others seeming to discriminate between a marriage in this state and out of it, were made, render them the more significant. In *Haviland* v. *Halstead*, 34 N. Y. 643, a person divorced for the same offence in this state, promised in New Jersey to marry the plaintiff. He married another, and an action for the breach of this promise was brought here, and failed. The parties resided in this state and contemplated the performance of the contract here. The court carefully distinguish the case so presented from one where a marriage had taken place in a foreign state. They

assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this state, and citing *Medway* v. *Needham*, *supra*, say the doctrine "in favor of marriage so contracted is founded on principles of policy, to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." Indeed, the general doctrine is so well settled by the decisions of all courts and the reiteration of text-writers, as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is, the law of the country where the contract is made: Story, *supra*, 84; 2 Kent Com. 91, 92. There are, no doubt, exceptions to this rule. Cases, first, of incest or polygamy coming within the prohibitions of natural law: *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Hutchins* v. *Kimmell*, 31 Mich. 133; Story, *supra*, sect. 113, 7th ed; second, of prohibition by positive law. It is contended by learned counsel for the respondent, that the judgment may be upheld upon the ground that the marriage is one of the latter class. The assertion, however, is left unsupported by argument or the citation of authorities. Its truth is not so self-evident as to dispense with either, and the omission, coupled with our own examination, leaves us to think that the courts have not yet spoken with a controlling voice in its favor. It is to be maintained, if at all, upon the prohibition in the judgment of divorce already referred to, and the provisions of the statute which made the judgment proper: *Graves* v. *Graves*, 2 Paige 62. The question is not one of ethics or morality but the extent of the authority of the statute as a rule of conduct. As a direct inquiry, it is here for the first time. There are *dicta* and expressions having relation to it in *Cropsey* v. *Ogden*, and *Haviland* v. *Halstead*, *supra*, tending to confine the effect of the statutory prohibition and declaration of invalidity to second marriages within this state; but in neither case was the precise question before the court for judgment. In other courts of this state it has met with differing answers. In the Supreme Court, First Department (*Marshall* v. *Marshall*, 2 Hun. 238, by a divided court, and *Thorpe* v. *Thorpe*, Superior Court of the City of New York, following it), a marriage under similar circumstances was held void. The judgment now before us went upon the principle of *stare decisis*, the court below also following *Marshall* v. *Marshall*,

supra. *Kerrison* v. *Kerrison*, Special Term, Fourth Department, 8 Abb. N. C. 444, and *Matter of Webb*, 1 Tucker 372 (Sur. Ct.), are to the contrary. To the latter class may be added *Ponsford* v. *Johnson*, before NELSON and BETTS, JJ., 2 Blatch. 51. These decisions are irreconcilable, and any determination reached by us must overrule one class or the other. We are therefore at liberty to treat the subject as *res integra*, unaffected by any paramount authority, although greatly assisted by the reasoning of the learned judges who have taken part in those judgments.

The statutory provisions relied upon by the respondent are found in part 2, ch. 8 of the Revised Statutes, entitled "Of the domestic relations," and especially in those articles which treat "of husband and wife," tit. 1, arts. 1–5, vol. 3, p. 148. The statute does not define marriage, or introduce a new formula for the relation, but treats it as existing, and declares it shall continue "in this state" a civil contract. Sec. 1, ch. 8, tit. 1, art. 1, part 2, adopts the principles of the common law, which renders invalid marriages between persons connected by certain lines of consanguinity (sec. 8, Id.), or who, for want of age or understanding, are incapable of consent, or who, if capable, have been induced to give it by fraud or force: Sec. 4, Id. It then declares that no second marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the marriage with such "former husband or wife shall have been dissolved for some cause other than the adultery of such person; and that every marriage contracted contrary to this provision shall be absolutely void:" Sec. 5, Id. These circumstances are re-stated as grounds of divorce, and it is enacted that "whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant:" Sec. 49, Id., art. 3. As originally enacted, the same statute (tit. 1, *supra*, sec. 2) not only made the consent of parties essential, but limited the class to those "capable in law of contracting," and by its definition excluded males under seventeen and females under fourteen years of age. Although this provision has been repealed, it throws some light upon the legislative intent in devising the system of laws concerning husband and wife. Conditions were annexed, not only to the duration, but the creation of this relation, and the frequency

with which it might be formed. Certain persons were declared capable, others incapable of forming it, and still others must submit to its dissolution. In one instance, as in the case before us, it cannot be contracted with another while the first co-contractor is living. It is obvious that this last condition is in the nature of a penalty: *Wait* v. *Wait*, 4 N. Y. 101; *Comm.* v. *Lane*, 113 Mass. 471. It forms no part of the relief sought by the injured party, has no tendency toward compensation, nor is it imposed to that end. It is restraint or punishment: *West Cambridge* v. *Lexington*, 1 Pick. 506–508; *Clark* v. *Clark*, 8 Cush. 386. The fact of adultery is, in the language of the statute, an "offence," the person committing it a "guilty person," and when established by judgment he is said to be "convicted;" he is, in consequence of it, deprived of a natural right or privilege which others enjoy. Moreover, for violating this statutory provision, he is at least rendered liable to fine and imprisonment as for a misdemeanor (2 R. S., part 4, ch. 1, tit. 6, p. 696, secs. 39, 40), if not for felony, under the provisions of article 2 of the same statute: 2 R. S., p. 687, vol. 2. The opinion of WALWORTH, Chancellor, went to that extent in *Graves* v. *Graves*, 2 Paige 62; and, although *People* v. *Hovey*, 5 Barb. 121, is to the contrary, the measure of the offence is not now important, and the last case holds to the misdemeanor. To that extent the law is plain. The real question is whether such a statute furnishes an exception to the maxim "*Leges extra territorium non obligant.*" It is not necessary to assert that the power of the legislature is so limited that no law passed by it would accompany a citizen into other countries, and there control or modify the legal effect of his actions. Nor need we deny that it might be so framed as to affect his person, and subject him in this state to punishment for its violation elsewhere, upon his return to the jurisdiction of our courts. On the contrary it is to be regarded as settled law that as all persons within its borders, whether citizens or aliens, are liable to be punished for any offence committed in this state against its laws, its citizens may also be punished for acts committed beyond its borders, where there is a special provision of law declaring the act to be an offence, although committed out of the state: Maxwell on Statutes 119, 128: *Cope* v. *Doherty*, 2 De G. & J. 624; 1 Burge Col. & For. Laws 196. So, also, may an act committed out of the state be made to affect an individual, whether citizen or foreigner, when he comes within

its borders and does some other act of which our laws take notice. Nor are examples of legislation effecting these results wanting. The statute defining acts which constitute treason (tit. 1, part 4, ch. 1, p. 928; 3 R. S., sec. 2) illustrates the first. It subjects the offender to punishment, whether the act prohibited is done "in this state or elsewhere." That against duelling is an example of the second. It makes one who, by previous engagement, fights a duel without the jurisdiction of this state, and in so doing inflicts a wound upon any person, "whereof he shall die within this state," and every second engaged in such duel, guilty of murder within this state. And still more in point, as illustrating its manner of expression, where the legislature intends to take cognisance of an act committed outside the limits of the state, or to impress upon the *status* of its citizens a condition of liability for such an act, are the revisions of the statute treating of offences against "the public peace and public morals:" tit. 5, part 4, ch. 1, act. 1, vol. 2, R. S. After providing punishments for fighting duels, sending challenges, &c., in the most general terms, excluding no one from its condemnation, but within the general maxim above quoted, having no extra-territorial force, comes a provision which, by its special language, attaches to the citizen, goes with him as he crosses the line of this state, and binds him with an obligation in what place soever he is. "If," it says (sec. 5, Id.), "any inhabitant of this state shall leave the same for the purpose of eluding the operation" of these provisions, and "shall give or receive any such challenge" * * * without this state, he shall be deemed guilty and subject to the like punishment as if the offence had been committed within this state. And we shall see later a provision similar to this, now forming part of the law relating to marriages in the state of Massachusetts. Another instance well shows by contrast the necessity of a declaration that the arm of the law shall be so extended. In proximity to the provisions I have quoted, in the next article (sect. 8), is the statute "of unlawful marriages," defining bigamy and declaring its punishment, saying, in general terms, "every person having a husband or wife living who shall marry any other person" (with exceptions of no moment here), shall be adjudged guilty of bigamy, providing (sect. 10) that an indictment may be found against any person for a second, third or other marriage herein prohibited, in the county in which he shall be apprehended, and the same proceedings had

thereon, "as if the offence had been committed therein." Yet there are no enlarging words affixing themselves to the person of the citizen, as in the statute before quoted, or bringing within its purview "a second or other marriage," contracted out of the state; and therefore, on the trial of one who was indicted for bigamy, the second marriage having taken place in Canada, it was held as early as 1855, by a court presided over by the late Judge W. F. ALLEN, then a justice of the Supreme Court, that this statute had no application; that the second marriage was not an offence against the laws of this state, because they have no "extra-territorial force." In like manner, if Barker Van Voorhis had, on his return to this state, after accomplishing his second marriage, been indicted under the statutes to which I have referred, either for bigamy or for doing a prohibited act, it would necessarily follow that the indictment would fail. Yet the words of the statute are general; in themselves they contain no limitation. But we have been referred to no case, and I think none can be found, where such general words have been interpreted so as to extend the action of a statute beyond the territorial authority of the legislature, and it is only by extending it that our courts can take cognisance of acts there committed.

Of the third class, an example is afforded by our statute defining punishment for a second offence. Sect. 8, p. 699, vol. 2, Rev. Stat., part 4, ch. 1, tit. 6. "If any person," it says, "convicted of any offence punishable by imprisonment, &c., shall afterwards be convicted of any offence, he shall be punished" in a mode prescribed. It is evident that these words are general, and taken literally would apply to "any person" committing an offence in or out of the state. Applying the mode of construction contended for by the respondent, nothing more could be necessary. But the legislature show that such is not its meaning. By sect. 10 they declare that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offence which if committed in this state would," &c., "shall upon conviction of any subsequent offence, committed within this state, be subject to punishment in the same manner and to the same extent as if the first conviction had taken place in a court of this state." Thus by implication is expressed the opinion of the legislature that the general words of the eighth section, *supra*, would not

meet the case provided for in the tenth section. In Massachusetts, after a statute extending the prohibition against a second marriage, under circumstances before stated, to inhabitants of that state going out of it to evade the law, it was held that if, in any event, the foreign marriage could be invalidated, it could not be without proof of the intent made necessary by statute. Nor without it could there be a conviction for polygamy: *Comm.* v. *Lane*, 113 Mass. 458. A similar distinction exists under the English law. In 1 Hale P. C. 662, the case is stated of a woman who married in England, and afterward married abroad during her husband's life. It was held she was not indictable under the statute of the former country for bigamy, for the offence was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. It is otherwise, however, in regard to certain offences committed in other countries by Englishmen against their government, viz., murder and slave-trading, because the statutes have so provided: *Warrender* v. *Warrender*, *supra*. Now if the criminal court has no jurisdiction to punish the act when committed out of the state, how has the civil court jurisdiction to prohibit the doing of the act out of the state. The consequences are the same in either case, and are prescribed by the same statute. Whether a man is punished by fine and imprisonment, or by disgrace to himself and the woman he married—the bastardy of his children—is a difference in degree only. The severer punishment is in the last alternative. Can the court imply the right to inflict it? Can it exist unless given in express language? I think not. The statute does not in terms prohibit a second marriage in another state, and it should not be extended by construction. The mode of construction contended for by the respondent, if applied to the statutes of treason and duelling and the punishment of second offences, would make useless those provisions which relate to the conduct of a citizen out of the state, or the commission of crime in this state by one convicted in another state. Can they be disregarded, or the legislature charged with useless enactments? On the contrary, we must give weight and meaning to them; to their presence in those laws and their absence in the one of marriages. The difference is essential, and the varying language cannot be disregarded. There is first a prohibition broad as in the act before us, wide enough to take in all persons within the state, and prohibiting certain acts—a per-

sonal prohibition. Not content with that, the statutes go further and extend the same consequences to those acts when committed out of the state. These provisions are lacking in the law before us. When, therefore, we consider the legislation of this state before referred to, and the general rules regulating the territorial force of the statutes, we cannot but regard the omission to provide by law for cases like the present as intentional; but if not, in the language of Lord ELLENBOROUGH, in *Rex* v. *Skone*, 6 East 518. "we can only say of the legislature, *quod voluit non dixit.*" This view is sustained by the course of decision and legislation in Massachusetts. In *Medway* v. *Needham*, *supra*, the plaintiff sued for the support of certain paupers, one Coffee and his wife, alleged to have their legal settlement with the defendant. The only question on the trial, or the subsequent hearing before the whole court, respected the validity of the marriage. He was a mulatto, and his supposed wife a white woman. They were inhabitants and residents of Massachusetts at the time of their marriage, and the statement is that "as the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island, and were there married according to the laws of that province," and returned immediately to their home. Both courts hold the marriage good. The statute regulating marriages in Massachusetts was at that time like our own, but the court placed their decision upon the general principle that a marriage good according to the laws of the country where it is entered into shall be valid in any other country, PARKER, C. J., saying: "This principle is considered so essential that even where it appears that the parties went into another state to evade the laws of their own country, the marriage in the foreign state shall be valid in the country where the parties live;" and referring to the statute which declares second marriages absolutely void, says: "They are only void if contracted within this state:" *West Cambridge* v. *Lexington*, 1 Pick. 506, involved the rights of infant children of Samuel Bemis, paupers, to public support in that state. The question turned upon the validity of his second marriage. His first had been dissolved for his adultery. Afterwards, and while his former wife was living, he married in New Hampshire, and the children were from that union. The court held that if the marriage had been contracted in Massachusetts, it would be unlawful and void; but that the laws of no country have

force outside of its own jurisdiction, and, therefore, one who by reason of his offence against it is disabled from contracting another marriage, may lawfully marry again in a state where no such disability is attached to the offence; and further, having a right to marry there, he could not, while there, violate the statutes of Massachusetts against polygamy. It was therefore held that the children were legitimate, their settlement to be where that of their father was, and the town entitled to recover for their support. The circumstances of *Putnam* v. *Putnam*, 8 Pick. 433, are singularly like those before us, and it was held that although the second marriage was a clear case of evasion of the laws of the Commonwealth, it was valid upon the general rule referred to in the cases already cited. The court also says: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another state—which, if entered into here, would be void—shall have no force within this Commonwealth." There is thus recognised a necessity, discussed earlier in this opinion, for express legislation, if the citizen is to be held bound by the laws of this state for acts performed by him outside its limits. Legislation to this end was afterwards had; Rev. Stat. of Mass., ch. 75, sect. 6; Tenn. St., ch. 106, sect. 6. Referring to provisions of the act making void marriages between certain parties, or by persons in prescribed conditions, or under certain circumstances, it declares, "where persons, resident in this state, in order to evade the preceding provisions, and with an intention of returning to reside in this state, go into another state or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this state." It is not necessary to consider the extent or scope of this statute. It has been discussed by the courts of this state, and is said by DEWEY, J., in *Commonwealth* v. *Hunt*, 4 Cush. 49, "to have been intended to meet this class of cases—that is, of individuals fraudulently attempting to evade the laws of Massachusetts, so far as respects persons divorced for adultery—and to declare such marriages by the guilty party to be void in this Commonwealth;" or as HUBBARD, J., says, in *Sutton* v. *Warren*, 10 Metc. 453, "The only object of this provision is, as stated by the commissioners in their reports, to enforce the observance of our own laws upon our own citizens, and not suffer them to violate regulations founded in a just

regard to good morals and sound policy." We have no law in relation to this subject similar to that of Massachusetts, or our statutes before cited, in reference to duelling and treason. There is nothing in the statute to indicate an intention of the legislature to reach beyond the state to inflict a penalty. Nor can I discover an intent to so impress the citizen with the prohibition as to make an act which is innocent and valid where performed an offence when he returns to this state, and himself a criminal for performing it. Every presumption is against such intention. The respondents rest their case upon the general words of the statute. These, taken in their natural and usual sense, would undoubtedly embrace the case of the appellant. "No second * * * marriage shall be contracted by any person during the lifetime of any former wife of such person." "Every such marriage shall be absolutely void." "No defendant convicted of adultery shall marry again until the death of the complainant." Equally broad are the provisions of the criminal law declaring the punishment of the offender. They would comprehend every second marriage wherever celebrated, and take in the citizens of every state. It cannot be denied that they are subject to explanation and restraint (*Mosher* v. *People*, *supra*), and the principle upon which it rests shows the criminal law to have no application to a marriage out of the state. The same rule was applied in *Sims* v. *Sims*, 75 N.Y. 466, where, after a very full discussion of the question involved, it was decided that the provision of the revised statutes (3 R. S. 994, sect. 23), declaring a person sentenced upon a conviction of a felony to be incompetent as a witness, does not apply to a conviction in another state; that it has reference only to a conviction in this state. The conviction was in Ohio. It was assumed that the convict would have been incompetent as a witness in that state. Suppose a judgment here followed his evidence, and it was afterwards prosecuted in Ohio. Would it be competent in defence to show that it was obtained upon evidence inadmissible by the laws of Ohio? Clearly not. And the reason is stated in the case cited. "The disqualification is in the nature of an additional penalty following and resulting from the conviction, and can not extend beyond the territorial limits of the state where the judgment was pronounced." He was therefore, a competent witness in the state of New York. There is, in principle, a close analogy between the case I have supposed and the one before us. In each

there is personal disqualification—in one, to marry; in the other, to testify. In neither case does the disqualification arise from any law of nature or of nations, but simply from positive law. Each deprived the offender of a civil right. Now in case of the witness, his testimony results in a judgment, a contract of record, to which, when it reaches Ohio, full effect must be given, and for its enforcement the machinery of the law in that state put in motion. In the other case, that in hand, a contract is entered into by the offender, which is a good contract under the laws of the state where made. If so, it should also follow that to each party thereto and to their issue every right and privilege growing out of the relation so established must attach. When, therefore, they return to this state with the evidence of that contract, can the courts do more than in the other case? Are they not limited to the inquiry whether the contract was valid in the state where made? And if it was, how can they deny to the child its inheritance? Let me go a little further. Suppose, on the day the decree of divorce was granted, Barker had also been convicted and sentenced for felony. He would then have been subject not only to the statutes above cited, but to that other which declares "that no person sentenced upon a conviction for felony shall be competent to testify in any cause:" 3 R. S. 994, sect. 23. Disqualified, therefore, to marry or to testify, he does both in Connecticut, brings back to this state the judgment record and the marriage contract. If the first can not be impeached because of his sentence, neither, as it seems to me, can the other because of his "conviction." And for the same reason—viz., that stated by Greenleaf as the result of the weight of modern opinion, sanctioned by this court in *Sims* v. *Sims*, *supra*, that personal disqualifications arising, not from the laws of nations, but from positive laws, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated.

Second. Nor are we, in the absence of express words to that effect, to infer that the legislature of this state intended its law to contravene the *jus gentium*, under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, and which is made binding by consent of all nations. It professedly and directly operates on all. To impugn it is to impugn public policy; and while each country can regulate the status of

its own citizens, until the will of the state finds clear and unmistakable expression, that must be controlling. "Where," says MARSHALL, C. J. (*United States* v. *Fisher*, 2 Cranch 380), "rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Our conclusion is that as the marriage in question was valid in Connecticut, the appellant, Rose Van Voorhis, is a legitimate child of Barker, and as such entitled to share in the estate of the testator.

The judgment should be reversed, and a new trial granted, without costs to the plaintiffs or Sarah A. Brintnall, but with costs to the appellant, Rose Van Voorhis, and to respondents, Ella and Elias, to be paid out of the estate.

All concur, except FOLGER, C. J., not voting.

The principal case must be regarded as determining for the state of New York, a very serious question in the law of marriage. Few graver questions are brought before the courts for determination, than those relating to the validity of marriage and the legitimacy of offspring. Any adjudication upon so important a subject, and emanating from so distinguished a court as the New York Court of Appeals, must necessarily be of great interest to the profession, and will be examined with care, in both America and England.

It is laid down in the foregoing opinion, that "it is a general rule of law, that a contract entered into in another state or country, if valid according to the law of that place, is valid everywhere." And cases are cited to the effect that a marriage valid where celebrated, is valid everywhere. It is submitted, however, with the greatest deference, that while the general rule may be as stated, it is not applicable to the state of facts existing in the particular case, and that the conclusion announced, cannot be sustained upon the authority of the English or American cases. In *Brook* v. *Brook*, decided in the House of Lords in 1861, (9 House of Lords Cases 193), the Lord Chancellor said: "There can be no doubt of the general rule, that a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated. This qualifi-

cation upon the rule, that a marriage valid where celebrated is good everywhere, is to be found in the writings of many eminent jurists who have discussed the subject. * * * It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions. In this case a marriage celebrated in Denmark, between persons domiciled in England, and which was valid according to the law of Denmark, was held void in England. The man had married the sister of his deceased wife, and the parties had gone to Denmark to evade the English law forbidding such marriages. The latest authoritative exposition of the English law is to be found in the opinion pronounced in the Court of Appeals as late as 1877, in *Sottomayor* v. *De Barros*, Law Rep., 3 Prob. 1. In that case it is said: "But it is a well recognised principle of law, that the question of personal capacity to enter into any contract, is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized, must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." And it was held that where a marriage was celebrated in England between citizens domiciled in another country, the marriage would be held void in England, if the parties were prohibited from marrying by the law of their domicile, and in an English work on the law of domicile, but recently published, we find it laid down as follows: "The validity of a marriage depends on two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due *form*. The capacity of each of the parties to a marriage, is to be judged of by their respective *lex domicilii*. Dicey on Domicile, p. 202.

There are English cases which might seem at first blush, not to warrant the principle thus laid down, but a broad distinction exists between such cases, which must not be lost sight of. For instance a marriage between an English subject domiciled in England, and a foreigner, would be held valid in England, although the foreigner might be prohibited from contracting the marriage by the law of his domicile. And this upon the principle that no country is bound to recognise the laws of a foreign state, when they work injustice to its own subjects: *Sottomayor* v. *De Barros*, L. R., 3 Prob. D. 1, 6, 7; and s. c., on further hearing, 19 Am. Law Reg. N. S. 76. Again, there are cases which recognise the validity of a marriage, where the parties have married away from their own country, for the purpose of evading the requirements of the law of domicile as to the consent of parents. But it is to be remarked, that the consent of parents, or others necessary to the validity of a marriage, are considered as part of the ceremony or form of marriage. See Dicey on Domicile, p. 203.

In the opinion in the principal case, much stress is laid upon the Massachusetts cases, and especially upon the case of *Medway* v. *Needham*, 16 Mass. 157 (1819), which was identical in principle with the one under discussion. It is interesting, therefore, to note the criticism passed on that case in the House of Lords. "I cannot think," said the Lord Chancellor, "that it is entitled to much weight, for the learned judge ad-

mitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only, of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden, on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognised as lawful." And Lord CRANWORTH, at the same time, remarked, "I also concur entirely with my noble and learned friend, that the American decision of *Medway* v. *Needham*, cannot be treated as proceeding on sound principles of law." And as to *Sutton* v. *Warren*, 10 Metcalf 451 (1845), also cited in the principal case, the Lord Chancellor said: "I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions, resting upon general jurisprudence. * * * I am bound to say that the decision rested on a total misapprehension of the law of England. * * * This decision, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers, ever since the Reformation." See *Brook* v. *Brook*, 9 House of Lords Cases 193. Mr. Burge, too, in his Commentaries on Colonial and Foreign Laws, p. 188, disapproves the Massachusetts cases, and maintains that the doctrine of the *lex loci* ought not to be extended to make valid the marriage, where the party retains his domicile in the country in which the prohibitory law prevails, and resorts to another state for the purpose of evading the law of his own.

The conclusion reached in the principal case is not only opposed to the doctrine of the English Court of Appeal, and of the House of Lords, but it is equally opposed to the weight of authority in this country.

The Supreme Court of North Carolina in 1854, passed upon a state of facts in all respects similar to those existing in the principal case. A divorce was obtained in North Carolina, and the guilty party was prohibited from marrying under a statute similar to the one in New York. The parties left the state for the purpose of contracting a marriage in evasion of the law, and having been married in South Carolina, where such a marriage was not prohibited, returned into North Carolina. The courts of the latter state held the marriage void. "Although it be true," said RUFFIN, Ch. J., "that generally, marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country, done purposely to defraud them. It cannot allow such acts abroad, under the pretence that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory." *Williams* v. *Oates*, 5 Ired. 535. The subject has recently been before the same court, and the former ruling was adhered to. *State* v. *Kennedy*, 76 N. C. 251 (1877). In this last case *Brook* v. *Brook*, *supra*, is approved, and the Massachusetts case of *Medway* v. *Needham*, *supra*, noticed and denied. "As to the formalities of marriage, the *lex loci* will govern. But when the law

of North Carolina declares," said the court, "that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go, so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of the marriage. * * * A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line." The same principle was announced in Louisiana in 1855, in *Dupre* v. *Executor of Boulard*, 10 La. Ann. 411. It was there held that a marriage celebrated in France, between parties domiciled in Louisiana, and in evasion of the law of domicile, was void. So in Tennessee in *State* v. *Bell*, 7 Baxter 9 (1872), where the court declares that the principle that a marriage valid where celebrated, is valid everywhere, is confined to the manner and form of the marriage, and does not apply to the capacity of the parties to contract the marriage. And it was there held that where a man married a woman of color in Mississippi in evasion of the law of Tennessee, and returned to the latter state, he could be indicted, although the marriage was valid in Mississippi. The same doctrine is announced in Virginia in *Kinney* v. *Commonwealth*, 30 Gratt. 858 (1878). In this case a negro and a white woman domiciled in Virginia, went into the District of Columbia, and were married in evasion of the law of their domicile. Upon their return the marriage was held void. We do not understand that in any of these cases, the statute expressly declared the marriage void, although entered into in another state. They are decided upon the authority of *Brook* v. *Brook*, *supra*, holding that the *lex domicilii* must determine the capacity of the parties. In the Virginia case, last cited, *Medway* v. *Needham*, as in most of the other cases, was expressly referred to, and openly repudiated as having been decided upon incorrect principles. It was admitted in a recent case in Massachusetts, in *Commonwealth* v. *Lane*, 113 Mass. 458, 465 (1873), that *Medway* v. *Needham* was decided upon the authority of English cases, in which the question concerned the *form* of the marriage, and not the *capacity* of the parties. In *Putnam* v. *Putnam*, 8 Pick. 433 (1829), the court in following *Medway* v. *Needham*, declared it was aware of all the objections to the ruling made in that case, but that the court in making it "adopted the rule of the law of England on this subject." *Medway* v. *Needham* must therefore be regarded as based upon a misconception of the extent of the principle, that a marriage valid where celebrated is valid everywhere.

Next to the Massachusetts cases, the case chiefly relied on in this country, by the advocates of the doctrine enunciated in the principal case, is *Stevenson* v. *Gray*, 17 B. Monr. 193 (1856). It is true that an opinion was expressed in that case, that a marriage, contracted under a similar state of circumstances to those existing in the principal case, would be valid in the place of domicile, and *Medway* v. *Needham* was referred to as an authority for the opinion. But the facts of the case did not make necessary the expression of any opinion upon that point, and the court expressly declared that no conflict could arise, upon the facts, "between the *lex loci contractus* and the *lex rei sitæ*, or between the *lex domicilii* and either or both of the others," as the marriage, even though it had been celebrated in Kentucky, would not have been, under the peculiar phraseology of their statute *void*, but only *voidable*. That after death of one of the parties, the marriage could not be avoided, and therefore the children must be regarded as legitimate. And so in the more recent case of *Dannelli* v. *Dannelli*, 4 Bush 51 (1868), where it

was sought to question the validity of a marriage which was said to have been contracted in Switzerland, in evasion of the law of Lombardy, the place of domicile, the same court declared: "As both reason and authority, regard the assent of parties, and the consummation thereof, by cohabitation, as a legal valid marriage, unless prohibited by the municipal laws of the country where celebrated, before we could pronounce this marriage as invalid, the laws of Switzerland making it so would have to be made known to us in a legal manner," which had not been done. It is thus apparent that in neither of these cases was it possible for the court to have held the marriage void as violating the law of the domicile.

Dickson v. *Dickson*, 1 Yerger (9 Tenn.) 110 (1826), is sometimes cited as sustaining doctrine similar to that announced in the principal case. But in that case the party, although divorced in Kentucky, and rendered incompetent to marry, had acquired a new domicile in Tennessee, and there married a man whose domicile was in that state, where they continued to reside until his death. Both parties were therefore qualified by the law of their domicile to contract the marriage. Even had the woman been incompetent the courts of Tennessee, as already pointed out, were under no obligations to hold the marriage void, inasmuch as this would be permitting the laws of Kentucky to work an injustice to the husband whose domicile was in the former state. And in *Fuller* v. *Fuller*, 40 Ala. 301 (1866), a similar state of facts existed, and a similar ruling was made. In neither case is there even a *dictum* in favor of the ruling made in the principal case. But such *dictum* may be found in *Van Storch* v. *Griffin*, 71 Penn. St. 240 (1872).

It is said in the principal case that a contract entered into in another state, if valid according to the law of that state, is valid anywhere. And the court immediately adds that a marriage valid where celebrated, is valid everywhere. There is no doubt of the correctness of both propositions. The difficulty is that neither principle applies to the state of facts before the court. We have tried to show that the last principle does not govern cases, in which a marriage has been contracted out of the state of the domicile, and in evasion of its laws prohibiting the parties from marrying. But if the question is to be tried upon principles of law which govern in cases of ordinary contracts, we think the same result is reached, for we find it laid down as elementary law in all the text writers, that no state is bound to enforce contracts injurious to its own interests, or in fraud or evasion of its laws, though made outside of its jurisdiction, and valid when and where made. Story's Conf. of Laws, sect. 244. And see, *Banchor* v. *Mansel*, 47 Me. 60 (1859); *Smith* v. *Godfrey*, 8 Foster (N. H.) 381, (1854). And this was admitted by Chief Justice PARKER in delivering his opinion in *Medway* v. *Needham*. "This doctrine is repugnant," he said, "to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country, where the parties have their domicile, could not, except in the contract of marriage, be protected under the general principle."

Great stress was also laid in the principal case, upon the fact that the legislature, while expressly declaring in the statutes of treason and duelling, that those offences should be punished though committed outside the state, yet failed to declare in the statute of marriages that a marriage contracted outside the state should be void. There is, however, a great distinction. It has never been deemed necessary to incorporate such a provision in the marriage laws, for the simple reason that such a provision would simply be in affirmance of the general principle, that all contracts entered into in another state for the fraudulent evasion

of the laws of the place of domicile where the contract is to be performed are void *ab initio*, and will not be recognised in the courts of the home state. Marriage is a civil contract for certain purposes, and is to be performed in the place where the parties reside, and it was not supposed that in this, the most important of all contracts to the welfare of the state as well as to the individual, the courts would recognise as valid, a marriage contract entered into in fraud and evasion of its laws, absolutely prohibiting it as contrary to the public weal. But on the other hand, if the state seeks to punish a criminal act, done by its own citizens outside of the state, it is equally a well settled principle of law, that it is necessary to expressly enact, that such acts shall be deemed punishable as though committed within the state.

In the principal case, the disability to marry is spoken of as a *penalty*, and that as such it can have no extra-territorial force. But in *Elliott* v. *Elliott*, 38 Md. 357, 363 (1873), the objection was raised to a law empowering the court in its discretion to decree in case of divorce, that the guilty party should not marry during the lifetime of the other party, that it was *ex post facto* in so far as it applied to a person who committed adultery before the act went into operation. The court, however, held otherwise. "It did not impose," so said the court, "any new punishment or penalty upon the adulterer, but simply withheld from him relief which he was never entitled to claim, and left him where he was before the decree was passed; under the disabilities of his marriage contract which before existed, or which are imposed, not by the Act of Assembly, but grow out of the marriage contract itself into which he had voluntarily entered." If such a decree leaves the guilty party "under the disabilities of his marriage contract which before existed," he certainly has no more right to marry after such a decree than he had before the decree was pronounced. And as the courts would be compelled to hold a marriage void contracted out of the state and *before* the divorce, so would it also be equally compelled to hold the marriage void contracted out of the state *after* the divorce. The principle "*Leges extra territorium non obligant*" would not apply.

The courts will not allow husband and wife to obtain a divorce in fraud of the law of their domicile, and if both parties by consent go into another state merely for the purpose of obtaining a divorce, and with the intent of returning to their former domicile after such divorce is obtained, upon their return, the courts of the place of domicile hold such a divorce null and void. *Harrison* v. *Harrison*, 20 Ala. 629; *State* v. *Armington*, 25 Minn. 29, 37 (1878); *People* v. *Dawell*, 25 Mich. 247 (1872). And this upon the principle that to each state belongs the exclusive right and power to determine for itself the matrimonial *status* of all its resident and domiciled citizens. The opinion of Mr. Justice COOLEY, in the Michigan case, above cited, is exceedingly able and of great interest. He says "there are three parties to every divorce—the husband, the wife, and the state— and the fact that the first two, consent to the jurisdiction of the courts of another state cannot give validity to the divorce, as the third party, the state where the parties are domiciled has not assented." So we say, there are three parties to every marriage,—the man, the woman, and the state where the parties are domiciled —and the fact that the first two agree to assume the matrimonial relation, cannot create a lawful marriage, if the third party by prohibiting the marriage refuses to assent thereto.

From the cases already cited we deduce these principles:

1. That a marriage valid where celebrated, is valid everywhere, so far as all questions of *form* are concerned.

2. That while the *lex loci* governs in questions of form, the *lex domicilii* determines the capacity of the parties to enter into the marriage contract.

3. That statutory provisions relating to the consent of parents, &c., go to the form of the marriage, and not to the capacity of the parties.

4. That where a marriage is contracted between parties whose domicile is different, the courts of the place of domicile will recognise the validity of the marriage in favor of its own citizen, although the other party may be disqualified by the law of the foreign domicile.

5. When a new domicile is acquired in good faith, the former incapacity ceases, and the capacity of the party must be determined by the law of the new domicile.

In addition to these principles we briefly note:

1. That polygamous and incestuous marriages are everywhere void. *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Hutchins* v. *Kimmell*, 31 Mich. 126, 134; *Sutton* v. *Warren*, 10 Metc. 451; *Commonwealth* v. *Lane*, 113 Mass. 458, 463; *State* v. *Ross*, 76 N. C. 245.

2. That marriages between infants are voidable and not void. *Cooley* v. *State*, 55 Ala. 162; *Beggs* v. *State*, 55 Id. 108; *Frost* v. *Vought*, 37 Mich. 65. In the case last cited, it is held that the Michigan statute rendering males of eighteen and females of sixteen, competent to contract marriage, makes the marriage actually entered into by them valid, but that it does not empower such persons while under the age of twenty-one to make valid executory contracts of marriage, for breach of which suits may be brought.

3. That marriages between persons, one of whom is insane at the time of marriage, are void. *Middleborough* v. *Rochester*, 12 Mass. 363; *Waymire* v. *Jetmore*, 22 Ohio St. 271; *Crump* v. *Morgan*, 3 Ired. Eq. 91; *Johnson* v. *Kincade*, Id. 470; *Powell* v. *Powell*, 18 Kans. 371. See *Stuckey* v. *Mathes*, 31 N. Y. Supt Ct. 461. That it is voidable. *Cole* v. *Cole*, 5 Sneed 57; *McKinney* v. *Clarke*, 2 Swan. 321.

4. That marriages between slaves were considered void. *Stikes* v. *Swanson*, 44 Ala. 633; *Cantelon* v. *Hood*, 56 Id. 519; *Smith* v. *State*, 9 Id. 996; *Malinda* v. *Gardner*, 24 Id. 719; *State* v. *Samuel*, 2 Dev. & Bat. L. 177; *Howard* v. *Howard*, 6 Jones L. 235; *Hall* v. *United States*, 2 Otto 27; *Ewing* v. *Bibb*, 7 Bush 654; *Steward* v. *Munchandler*, 2 Id. 278; *McReynolds* v. *State*, 55 5 Cald. (Tenn.) 18.

5. That marriages between Indians according to Indian customs are considered valid, although the husband has the right to dismiss the wife at his volition, and the tribe live within the state limits. *Boyer* v. *Dively*, 58 Mo. 510; *Wall* v. *Williamson*, 11 Ala. 839; *Morgan* v. *McGhee*, 5 Hump. 13; *Johnson* v. *Johnson*, 30 Mo. 72.

6. That a marriage procured through the fraud of one party, is generally said to be void. See Schouler Dom. Rel. 35. Reeves Dom. Rel. 206; 2 Kent's Com. 767. 1 Bishop on Mar. and Div. sect. 115. In *Tomppert* v. *Tomppert*, 13 Bush 326 (1877), the Kentucky court repudiates this doctrine, and declares it is only voidable and not void. And see *Guilford* v. *Oxford*, 9 Conn. 326.

7. That the statutory provisions requiring that no marriage be celebrated until after a license has issued, &c., are directory merely, and will not invalidate a marriage performed without compliance therewith, in the absence of express provisions declaring such marriages void. *Ely* v. *Gammel*, 52 Ala. 584, 586; *Beggs* v. *State*, 55 Id. 112; *Parton* v. *Hervey*, 1 Gray 119; *Milford* v. *Worcester*, 7 Mass. 48; *Cargile* v. *Wood*, 63 Mo. 501; *Holabird* v. *Ins. Co.*, 2 Dillon 167; *Rundle* v. *Pegram*, 49 Miss. 751; *Hutchins* v. *Kimmell*, 31 Mich. 133. But where the statutory conditions

have not been complied with, it is held that there must be some independent proof of an actual and voluntary consent, indicating the existence of a deliberately recognised marriage. And positive evidence of non-assent is of weight against an irregular ceremony. *Kopke* v. *People*, 43 Mich. 45 (1880).

8. That a marriage entered into through duress is void, but not when fear arises from an arrest and prosecution for bastardy. *Williams* v. *State*, 44 Ala. 24; *Honnett* v. *Honnett*, 33 Ark. 156. See *Willard* v. *Willard*, 6 Baxter (Tenn.) 298.

9. That there is nothing in the Constitution of the United States which prevents the states from declaring all miscegenetic marriages void. *State* v. *Hairston*, 63 N. C. 451; *State* v. *Reinhard*, 63 Id. 547; *Kinney* v. *Commonwealth*, 30 Gratt. 858; *Green* v. *State*, 58 Ala. 190.

We shall conclude this note with the following quotation from Story's Conf. of Laws, p. 178 (7th ed.): "If the incapacity of the parties is such that no marriage could be solemnized between them, * * * and without changing their domicile they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say, that a proper self-respect (of the state or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail."

HENRY WADE ROGERS.

Supreme Court of Pennsylvania.

WIREBACH'S EXECUTOR *v.* FIRST NATIONAL BANK OF EASTON.

A lunatic who is an accommodation endorser without consideration upon a promissory note, and who has derived no advantage from his endorsement, either to himself or his estate, is not liable to a *bona fide* holder, although the latter had no knowledge of the lunacy.

Error to the Common Pleas of Northampton county.

Assumpsit against the executor of Wirebach, upon a promissory note drawn by one Christman to the order of Wirebach, and endorsed by the latter. Plea, non assumpsit.

Upon the trial the following facts appeared: In January 1876, Wirebach endorsed a note of $4000 jointly with Richards and Christman for the accommodation of Stocker & Co., a firm doing business in South Easton, which note was discounted by the First National Bank of Easton. Besides this note of $4000, the bank held at the time ten other notes of Stocker & Co., upon which Wirebach was not an endorser, but upon which Richards and Christman were endorsers, and these notes were carried along from time to time in different amounts, and maturing at different dates. In the beginning of December 1876, after one of the notes fell due and went to protest, Christman had an interview with the

president of the bank. It was then arranged that the said notes, eleven in number, should be replaced by one note, and that Christman should procure Wirebach to become endorser on the said note, and that Richards and Christman should be the drawers. Stocker & Co. were not to be parties to the new note.

In pursuance of this agreement, Christman, on December 7th 1876, met Wirebach by appointment, and went with him to the bank, where, in the presence of the president, who had prepared a calculation of the total amount of the eleven notes, the note in suit was duly executed for $10,075.

The defendant set up that both before and at the time of the execution of the original note and the renewal, Wirebach was unsound in mind and incapable of contracting, and that the bargain was unconscionable, and had been obtained by undue influence and fraud. The testimony as to the insanity of Wirebach was conflicting, but there was no direct testimony on the part of the defendant that the officers of the bank knew of Wirebach's condition, except in so far as they might have inferred it from his actions while the transaction was being carried on.

Verdict and judgment for the plaintiff. The defendant took this writ.

Edward J. Fox (*W. S. Kirkpatrick* with him), for the plaintiff in error, cited, *Mitchell* v. *Kingman*, 5 Pick. 431; *Taylor* v. *Dudley*, 5 Dana 310; *Thornton* v. *Appleton*, 29 Maine 298; *Webster* v. *Woodford*, 3 Day 100; *Grant* v. *Thompson*, 4 Conn. 204; *Morris* v. *Clay*, 8 Jones 216; *Lazell* v. *Pinnick & Matson*, 1 Tyler 247; *Seaver* v. *Phelps*, 11 Pick. 304; *Bank* v. *Moore*, 28 P. F. Smith 407.

W. W. Schuyler (*William Mutchler* with him), for the defendant in error, cited, *La Rue* v. *Gilkyson*, 4 Barr 375; *Beals* v. *See*, 10 Id. 56; *Bank* v. *Moore*, 28 P. F. Smith 407; Molton v. *Camroux*, 2 Exch. 487; *Elliot* v. *Ince*, 7 DeG., M. & G. 487; *Wilder* v. *Weakley*, 34 Ind. 181; Benjamin on Sales, sect. 29, 1 Am. Ed.

The opinion of the court was delivered by

TRUNKEY, J.—Where a person fairly and in good faith sells property, or loans money to a lunatic who appears to be sane and

is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed in *statu quo*, such a contract cannot afterwards be set aside, or payment refused by the lunatic or his representatives: (*La Rue* v. *Gilkyson*, 4 Barr 375; *Beals* v. *See*, 10 Id. 56; *Lancaster County Bank* v. *Moore*, 28 P. F. Smith 407; *Wilder* v. *Weakley*, 34 Ind. 181; *Elliott* v. *Ince*, 7 De G., M. & G. 475, 487). In *Elliott* v. *Ince* it is remarked that "the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Chief Justice GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.

There can be no binding executory agreement where one of the parties is bereft of reason—a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract, yet it is common to speak of his torts and his contracts, and on many of them he is liable in a civil action. One who knowingly sells goods to an insane person, necessary for his use, may recover their value on the same principle that an infant is liable for necessaries he purchases. His liability for necessaries and suitable articles is deemed rather a benefit than a disadvantage to him.

It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of liability, and when not for necessaries, the opposite party had no knowledge of the lunacy. Thus, in *Lancaster County Bank* v. *Moore*, *supra*, stress was put on the fact that the bank had no knowledge of Moore's insanity, and in good faith loaned the money which was placed to his credit and checked out by him. It was held to be within the doctrine of *Beals* v. *See*, that the contract was executed so far as the consideration was concerned, and that the rule which prevents insane persons obtaining the property of innocent parties and retaining both property and price, required payment of the note: *Snyder* v.

Laubach, 7 W. N. C. 464, is where York's endorsement of the note was merely a renewal of an endorsement made when he was unquestionably of sound mind; and it was held that as he was clearly liable on the note of which the note in suit was a renewal, there was full consideration, and the case was within the decision in *Lancaster County Bank* v. *Moore*. The consideration was a debt for the amount of the renewal note. So in *Kneedler's Appeal*, 37 Leg. Int. 504, a judgment entered on a bond by virtue of a warrant of attorney was allowed to stand because the lunatic, acting by advice of counsel, received the full consideration which he prudently applied in payment of his undisputed debts, and the plaintiff had no knowledge of the insanity when the money was loaned. Of like purport are every one of the cases decided elsewhere, which are cited and relied on by the defendant in error. In most if not all cases where an insane person has been held answerable as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation endorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in *Moore* v. *Hershey*, 9 Norris 196. There the action was by an endorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. PAXSON, J., said, "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the *status* of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of

unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he endorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner, a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder, who may have given value to his endorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves; but it would be sorry protection if one holding a valid note against a helpless man for $4000 could get it renewed for $10,000, and recover the full amount of the renewal-note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain; and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or endorser, in fact, is a surety for the principal debtor; and, when he is an infant or insane person, he or his representative may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man.

This action is upon a note for $10,075.92, which was given to the bank to take up notes of Stocker & Co., which were endorsed by Richards and Christman. J. C. Wirebach was accommodation endorser, and this was known to the bank. He was an endorser on one of the former notes for $4000. It is alleged by the defence that Wirebach was incapable of making a contract by reason of insanity, not only at the date of the note in suit, but also at the date of said former note. If this fact were established the verdict should have been for defendant. And if he were sane when he endorsed the prior note, and insane at the time he endorsed the

note in suit, he is not liable for the one in suit, as it is not a mere renewal-note. The learned judge of the Common Pleas instructed the jury that, "to entitle the defendant to a verdict in this case, he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December 1876, and that the bank had notice or knowledge of such unsoundness." We are of opinion that it was error to rule that the defence failed, unless the bank had such notice or knowledge. This ruling pervaded the charge and answers to points of defendant; there is no occasion for special remark on each of the first nine specifications of error. We are not satisfied that the court erred in charging that there was no evidence of fraud, misrepresentation or undue influence on the part of the bank, or of fraudulent practices by Christman or Wirebach, to authorize submission of these questions. Fraud is not to be presumed from the mere fact of endorsement, even by a man feeble in mind and body. It is common for one friend, though possessed of strong mind, to ruin himself financially by endorsing for another; and while it is very imprudent, if not rash, it has never been considered unconscionable, except when procured by some artifice or fraud, of which there must be some evidence. Were the endorser weak-minded, less evidence would be required to establish the fraud.

None of the assignments relative to the offers of testimony by the defendant are sustained. One is to the effect that the defendant was prevented from proving by Mr. Scott that Wirebach was a shrewd, intelligent business man prior to 1875. Why the court overruled the direct question is not stated, but the witness was properly examined, and testified that Wirebach's manner of conversation was good, that he was a fluent talker, intelligent, had a good memory and was an intelligent business man. All of the witnesses were allowed to testify, so far as they knew, as to his appearance, manner, conversation and acts, before and after the commencement of his alleged unsoundness of mind. Nor do we think that the insolvency of Richards and Christman, or the value of Wirebach's property at the date of the endorsement, or that Wirebach once took an interest in, and was well informed on political matters, were facts so strictly pertinent that it was error to reject them. The admissibility of such facts depends much on other testimony in the cause, and most generally safely rests in the judgment of the court where the cause is tried.

The learned judge seems to have carefully considered his rulings, and to have fairly submitted to the jury to determine as to the alleged insanity of Wirebach at the time of the endorsement. But for the single error relative to notice to or knowledge by the bank of the insanity of Wirebach, the case must go back for another trial.

Judgment reversed, and *venire facias de novo* awarded.

The doctrine that a contract entirely executory on both sides cannot be enforced against an insane person, is too well settled to need any citation of authorities. (See the cases collected in Ewell's Leading Cases on Disabilities, 525.)

As to contracts wholly or in part executed, there is, however, some difference of opinion among the authorities. In *Seaver* v. *Phelps*, 11 Pick. 304; s. c., Ewell's Lead. Cas. 610, decided in 1831, which was trover for a promissory note pledged to the defendant by the plaintiff while he was insane, although it did not appear that the contract to secure the performance of which the pledge was made was an executed one, the distinction between executed and executory contracts was not regarded by the court as at all material, and it was held that it was not a legal defence that the defendant, at the time he took the pledge, was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him nor practice any fraud or unfairness. See, also, *Gibson* v. *Soper*, 6 Gray 279; *Bond* v. *Bond*, 7 Allen 1; *Henry* v. *Fine*, 23 Ark. 417; *Somers* v. *Pumphrey*, 24 Ind. 238; *Chew* v. *Bank of Baltimore*, 14 Md. 318; *Hovey* v. *Hobson*, 53 Me. 453; *Fitzgerald* v. *Reed*, 17 Miss. 94. Were the point not settled by authority, it would seem difficult, on principle merely, to answer the position taken in *Seaver* v. *Phelps*, that "the fairness of the defendant's conduct cannot supply the plaintiff's want of capacity," except, perhaps, in the case of contracts for necessaries, which stand upon a different ground. The first proposition of the court in the principal case, however, is supported by the clear weight of authority, both English and American. Besides the case of *La Rue* v. *Gilkyson* and the other cases cited by the court, see to the same point the leading case of *Molton* v. *Camroux*, 2 Exch. 487; s. c., affirmed in 4 Exch. 17, decided in 1848; *Beavan* v. *McDonnell*, 9 Exch. 309; s. c., 10 Id. 184; *Campbell* v. *Hooper*, 3 Sm. & G. 153; *Hassard* v. *Smith*, 6 Ir. Eq. Rep. 429; *Young* v. *Stevens*, 48 N. H. 133; *Behrens* v. *McKenzie*, 23 Iowa 343; *Fitzhugh* v. *Wilcox*, 12. Barb. 237; *Person* v. *Warren*, 14 Id. 488; *Yonger* v. *Skinner*, 14 N. J. Eq. 389; *Ballard* v. *McKenna*, 4 Rich. Eq. 358; *Sims* v. *McLure*, 8 Id. 286; *Matthiessen & W. Refining Co.* v. *McMahon*, 38 N. J. Law 537: *McCormick* v. *Littler*, 85 Ill. 62; *Scanlan* v. *Cobb*, Id. 299. See, also, *Lincoln* v. *Buckmaster*, 32 Vt. 658; *Long* v. *Long*, 9 Md. 348.

In *Molton* v. *Camroux*, the lunatic purchased certain annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of the society, and it was held that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

In *Campbell* v. *Hooper*, the principle of *Molton* v. *Camroux* was applied to a bill for the foreclosure of a mortgage as against the real and personal representatives of a mortgagor who was a lunatic

at the time of the execution of the mortgage, it appearing that the money, to secure the repayment of which the mortgage was executed, was honestly paid, and that no advantage was taken by the mortgagee, and that he had no knowledge of the lunacy when he paid the money.

In *Behrens McKenzie*, defendant was held liable on an injunction bond executed by him while insane, the enjoyment of the benefit of the writ being the consideration enjoyed by him.

The limitations upon the doctrine stated at the outset in the principal case, that, in order to hold the lunatic liable, there must have been neither imposition nor want of full consideration for the amount of liability, and that, when not for necessaries, the opposite party must have had no knowledge of the lunacy, are supported alike by reason and authority. The cases all seem to concede that, except in the case of necessaries, the protection of the law is not to be extended to one knowing the insanity of the party with whom he is contracting. See *Henry* v. *Fine*, 23 Ark. 420. And it is sufficient notice where the circumstances known in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on inquiry by which he might, if reasonably prudent, have learned the fact: *Lincoln* v. *Buckmaster*, 32 Vt. 658.

It is generally considered that an adjudication of insanity is sufficient to avoid subsequent contracts. In *McCormick* v. *Littler*, 85 Ill. 62, however, it was held that, although a person may have been adjudged insane, yet, if no conservator has been appointed, and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, if he purchases an article necessary and useful in his business, at a fair and reasonable price, the seller having no notice of his having been adjudged insane, he will be liable to pay the price he agreed to pay.

The limitation upon the rule in *Molton* v. *Camroux*, laid down in the principal case, that the consideration must be full, fair and conscionable, and the decision arrived at in applying the law to the facts of the principal case place the law upon this subject upon a satisfactory basis. Although the rule in *Seaver* v. *Phelps*, as a matter of mere principle, seems well founded, unquestionably as a matter of policy and justice the rule in *Molton* v. *Camroux* works out more satisfactory and just results. If a lunatic could be held liable upon an accommodation endorsement, even though in the hands of a *bona fide* holder, the protection which it is the object of the law to extend to this unfortunate class of persons would amount to nothing. The rule of *Molton* v. *Camroux*, as to executed contracts, with the above limitations, affords all the protection that can safely be extended to persons dealing with lunatics, without practically abolishing the disability itself; and the principal case is important as being probably the first that clearly lays down and applies this salutary limitation. In *Van Patton* v. *Beals*, 46 Iowa 62, it was held that an insane person who signs as surety a note given for an antecedent debt, cannot be held liable thereon, even though the person taking the note had no knowledge of the incapacity of the surety. In that case, however, *Seaver* v. *Phelps* is cited with approval, and no case has been found, other than *Moore* v. *Hershey*, cited in the principal case, which discusses the question there involved. Altogether, the decision is a satisfactory one, and will doubtless become a leading case in this branch of the law.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Missouri.

BAILE ET AL. v. ST. JOSEPH FIRE AND MARINE INSURANCE COMPANY.

A verbal agreement to insure is binding, and in case of loss will be specifically enforced against the insurer.

Henning v. *United States Insurance Company*, 47 Mo. 425, distinguished.

The only element of a valid contract of insurance not expressly agreed upon in this case was the risk. The insuring company, however, was only authorized to insure against fire on land and marine risks elsewhere, and the subject-matter of the insurance was a stock of goods in store. *Held*, that from this it could properly be inferred that the risk insured against was fire.

The method of enforcing specific performance of a verbal contract to issue a policy of insurance, after a loss has occurred, is not to compel the issuance of the policy but to decree payment of the money as if the policy had issued.

It is no defence to an action to compel specific performance of a contract to issue a policy of insurance that the policy, if issued, would have contained a prohibition against additional insurance, without the consent of the insurer written on the policy, and that the plaintiff had obtained additional insurance without such consent.

Where a policy contains a prohibition against additional insurance without the consent of the insurer written thereon, if notice of such additional insurance be given to an agent of the insurer and he assents thereto, it will be sufficient though his assent be verbal only.

It is no defence to an action to compel specific performance of a contract to issue a policy of insurance that the policy, if issued, would have contained a requirement that in case of loss the insurer should be forthwith furnished with proofs of loss, and that plaintiff had not complied with this requirement.

If an insurance company whose agent has made a verbal contract to issue a policy, upon being applied to for the policy by the party entitled, after a loss has occurred, refuses to issue the policy on the ground that it is not liable on the contract, it cannot afterward depend on the ground that proofs of loss were not furnished in time.

If the payee in a note receives a mortgage with the understanding that he is to hold it as a security for the payment of the note, only until he can assure himself of the solvency of another party who is offered as surety, and upon inquiry he ascertains that the proposed surety is solvent and the signature of the latter to the note is procured, and thereafter the payee receives the note and keeps it for several months without objection, the mortgage will be deemed satisfied and discharged.

Parol evidence is admissible to show that a mortgage has been fully discharged, or to explain or contradict the consideration clause.

APPEAL from Buchanan Circuit Court. Suit in equity.

The local agent of defendant at Warrensburg, solicited plaintiffs, who were merchants at that place, to take $2500 insurance upon their stock of goods, to continue one year. Plaintiffs consented, paid the premium, and received from the agent the following receipt:

Warrensburg, December 5th 1873.

Received of Baile & Ridenour $43.75, paid as premium on $2500 insurance in the St. Joseph and Marine Insurance Company of St. Joseph, for which I agree to deliver a policy.

E. H. SHOTWELL, agent, &c.

Plaintiffs' application and the premium paid were forwarded by Shotwell to the home office of the company at St. Joseph, but within a few days, and before the delivery of the policy, plaintiffs' store and stock were destroyed by fire. The day after the fire plaintiffs notified the defendant, who immediately sent its secretary to Warrensburg to inquire into the case. In the prosecution of his inquiries he took the depositions of plaintiffs. Shortly after this plaintiffs demanded a policy of defendant, who refused to issue one, and denied all liability for the loss on the ground that nothing but a written or printed policy, signed by the president and attested by the secretary, could impose a legal liability on the company, and none such had ever been issued.

No formal proofs of loss were furnished to the company until after the lapse of ten months, but no objection on that score was made by the company until the filing of the answer in this case. The answer denied liability on the ground that no verbal contract of insurance was binding on defendant under its charter and the laws of the state, and further set up several affirmative defences growing out of the character and conditions of the policy that defendant would have issued if it had issued any: 1. That the policy would have contained a prohibition against additional insurance without the consent of the defendant written on the policy, and that there was a breach of such conditions. 2. That the policy would have contained a condition against misrepresentations in the application, and that there was a misrepresentation, in this, that it was stated, in the application that the plaintiffs' stock of goods was unincumbered, when in fact there was a valid subsisting chattel mortgage thereon. 3. That the policy would have contained a condition that as soon as possible after a loss the insured should render a particular account of the loss duly verified, and that this condition had not been complied with. Plaintiffs' replies to these defences sufficiently appear in the opinion.

The case was submitted to the court on the pleadings and proofs, and there was a judgment for the defendant.

Doniphan & Reed and *Crittenden & Cockrell*, for appellants.

H. E. Barnard, for respondent.

The opinion of the court was delivered by

SHERWOOD, C. J.—1. The validity of the contract is the first point demanding attention. The charter of the defendant company is that furnished by the general law: ch. 67, Gen. Stat., 1865, p. 353. The concluding words of sect. 1, of that chapter, require that the "conditions of all policies issued by such company, shall be written or printed on the face thereof;" and sect. 8, of the same chapter, provides that "all policies and contracts of insurance and instruments of guarantee, made by said company, shall be subscribed by the president or president *pro tempore*, and attested by the secretary." Similar language to that just quoted was passed upon by this court in *Henning* v. *United States Ins. Co.*, 47 Mo. 425, and it was held that with such charter and by-laws the company could make no original and oral contract of insurance. In that case, however, sect. 6 of ch. 62, Gen. Stat., 1865, was overlooked. That section, which has been on the statute-book for over thirty-five years (Stat., 1845, p. 232, sect. 8), provides that "parol contracts may be binding on aggregate corporations, if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation, and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character." Passing upon the effect of this section, it was held in the Circuit Court of the United States for the Eastern District of Missouri, in an action between the forementioned parties, that construed in the light of the general law, the charter of the insurance company did not disable it from making a binding contract of insurance without writing: *Henning* v. *United States Ins. Co.*, 2 Dillon C. C. 26.

This view is certainly the better one, even where there is no such general provision as that above quoted, making oral contracts of aggregate corporations valid. It must now be considered as the well-settled doctrine by nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chap. 67, *supra*. The principle underlying these

decisions is this: That the right to make contracts of insurance, like any other right of contracting, exists at common law, unless prohibited by statute; that the contract of insurance having its origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in particular modes and forms, is without foundation, and repugnant to, and inconsistent with, that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of the charter of a company that they shall have the right to make contracts of insurance by the signature of a president, &c., are regarded by the courts as merely enabling and not restrictive of the general power to effect contracts in any other mode not unlawful, dictated by convenience; and that "*the distinction between a contract to insure or to issue a policy and the policy itself is obvious and constantly recognised by the courts:*" May on Insurance, sects. 14, 22, 23, 128; *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw. 82; *Sanborn* v. *Fireman's Ins. Co.*, 16 Gray 448; *Trustees* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Relief Fire Ins. Co.* v. *Shaw*, 94 U. S. 574; *New England, &c.* v. *Robinson*, 25 Ind. 536; 56 Mo. 371; *Henning* v. *Ins. Co.*, *supra*. In view, however, of the broad statutory provisions heretofore cited, relating to the power of aggregate corporations to contract orally, all difficulty as to the power to make, in the present circumstances, an oral contract of insurance, vanishes. Besides that, sect. 8, *supra*, requiring the signature of the president, &c., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature. It is unnecessary to the proper determination of this case, that the one already cited from our own reports, and greatly relied on by the defendant, be overruled; but it is not unworthy of remark that the utterances were in that case for the most part, almost, if not altogether, *obiter*, since therein it is distinctly asserted that the contract in that instance was "nothing but a naked verbal agreement * * * sued upon. This is denied, and there is no proof of it." So that that case could have been very briefly disposed of, as having no evidential foundation requiring either judicial discussion or determination. Be that as it may, the doctrine announced in that case does not dominate this one, for the reason that that case was a suit at law on an alleged oral and completed agreement; *this*, a proceeding *in equity*, to compel

that to be done which already upon sufficient consideration had been agreed should be done. And the case under discussion expressly recognised the principle announced in *Marine Ins. Co.* v. *Union Mutual Ins. Co.*, 19 How. 319, as well as in numerous other cases cited by plaintiffs, that equity will specifically enforce "*agreements* to make insurance." Conceding, then, as we must, from the authorities and statutory provisions above noted, the power of the defendant company to make such an agreement to insure the goods and merchandise of plaintiffs as can be enforced in equity, was a contract possessing such necessary constituent elements as equity will recognise and enforce made in the case at the bar? We have no doubt on this score, and for these reasons: The evidence discloses a contract for a policy of insurance negotiated for between plaintiffs and defendants' local agent, the reception of and receipt for the required premium, the subject-matter insured, the amount of insurance and the duration of the policy. The only element of the contract of insurance left incomplete by the evidence is the *risk* insured against, but this is supplied by reasonable intendment and necessary implication arising from the nature of the business engaged in by the defendant company—*fire* insurance on *land* and marine insurance elsewhere, and by the circumstances and situation of the property insured. And it is competent to *infer* the *nature* of the *risk* insured against. Thus it has been held that when the hazard is *fire alone*, and the subject an unfinished vessel never afloat for a voyage, and not a subject for *marine insurance*, a contract to insure must be regarded as a *fire insurance: Eureka Ins. Co.* v. *Robinson*, 56 Penna. St. 256.

The evidence further discloses the forwarding of the premium thus received to the home office, the notification of the company by its local agent of the occurrence of the fire, the immediate coming to Warrensburg of Rice, the secretary of defendants, and its special adjuster of losses, and his taking of the depositions of plaintiffs as to the cause of the fire, the amount of goods burned and the aggregate sum of insurance, and the retention of the premium. If from these facts a contract to issue a policy cannot be implied on the part of the defendant, or even be regarded as well established by the evidence, it would be hard to conceive of a case furnishing sufficient *data* to bind with obligatory force a recalcitrant corporation. And it would be

intolerable that such corporation should ratify the acts of its local agent in manner as aforesaid, receive the consideration for issuing a policy, retain that consideration, and yet refuse to do the act for which that consideration was given.

II. We have already seen that a valid oral contract to insure having been made, equity will specifically enforce such initial, or preliminary, contract. This is done where a loss has occurred, not by actually requiring that a policy of insurance be issued, but by a decree for payment of the loss as if a policy had issued. This method of affording relief, of administering remedial justice, proceeds upon the ground of circuity of action: May on Insurance, sect. 565, and cases cited; and doubtless upon further ground that equity, once possessed of a cause, will, before releasing its grasp on the *res*, avoid a multiplicity of suits by doing full, adequate and complete justice between the parties, by entering that judgment to which the party will be ultimately entitled: *Real Estate Saving Inst.* v. *Collonious*, 63 Mo. 290.

III. The first special defence of defendants' answer cannot prevail. There being no policy of insurance issued, the endorsing of subsequent insurance on a non-issued policy can scarcely be regarded as within the domain of possibility. The law never requires impossibilities. Defendant failing and refusing to issue a policy according to contract, cannot visit upon plaintiffs the prejudicial results arising solely out of its own non-performance: *Eureka Ins. Co.* v. *Robinson*, 56 Penn St. 256.

Plaintiffs not being furnished with a policy of insurance containing the condition of its issuance, it would be most unreasonable to require at their hands a compliance with those unknown conditions. No policy having been issued, nothing more, in justice to defendant, was requisite than that it be notified of subsequent insurance: *Eureka Ins. Co.* v. *Robinson*, *supra*. This was done, as shown by the testimony, the next day after the insurance was effected, by informing the local agent of such subsequent insurance in the Planters. The agent, when notified, according to the testimony of one witness, said "that was all right;" and according to the testimony of another witness, made no objection, so that, even had there been a policy of insurance actually issued, this conduct of the agent would have rendered the notice of subsequent insurance equivalent in the circumstances to an endorsement on the policy of the fact contained in such notice. The decided tendency of

modern adjudication is in this direction, and the company is held estopped from insisting on a forfeiture of the policy because the stipulation referred to has not been literally complied with: May on Insurance, sect. 370; *Hayward* v. *Ins. Co.*, 52 Mo. 181.

IV. The second special defence is as unmaintainable as the first. The testimony shows very clearly that though technically incorrect, the answer given that there was no mortgage on the insured property was actually true; and the evidence, when carefully examined, shows no conflict on this point. That evidence discloses that the deed of trust was given for a special purpose, and only for that purpose—*i. e.*, to remain as a security for the note given by Ridenour to Congdon, for the latter's interest in the goods, until communication was had with Ohio, the endorsement of Glandner on the note obtained, and Congdon should be satisfied with the solvency of the endorser. This communication with Ohio took place. Crittenden and Cockrell, the attorneys for Congdon, employed by him for that purpose. opened a correspondence with persons in that state, ascertained, as required, that Glandner was solvent and responsible, had the note endorsed by Glandner, returned it to their client about the 1st of September 1873, who retained it in his possession without objection, though he did not enter satisfaction of the deed of trust.

In these circumstances the deed must be held as satisfied, and no longer a subsisting encumbrance at the time plaintiffs applied for insurance. Congdon's conduct on this occasion, after what had passed, must be held tantamount to an admission that he was satisfied with Glandner as an endorser, and that the deed of trust had served its purpose: 1 Greenl. Ev., sect. 197.

If the note of Ridenour had been paid prior to the last-named period, no one would doubt the competency of parol evidence to show that fact. If competent in that case, then competent also in this. It is always competent to show by verbal evidence that a written agreement is "totally discharged:" 1 Grenl. on Ev., sect. 302; May on Ins., sect. 290; *Hawkes* v. *Ins. Co.*, 11 Wis. 188.

Again, the consideration of the deed of trust as expressed on its face was to secure the note, but the law is well settled in this state that you may, by verbal testimony, explain or contradict the consideration clause in a deed, such clause only possessing the force of

a receipt: *Fontaine* v. *Boatmans' Sav. Inst.*, 57 Mo. 561; *Hollocher* v. *Hollocher*, 62 Id. 267. No importance is to be attached to the date of the deed of trust being subsequent to the note. This is fully explained by the evidence as well as the fact that the deed of trust, through mistake of the scrivener, was drawn to extend over a longer period of time than that intended by the parties.

V. The failure of the plaintiffs to furnish formal proofs of loss cannot avail the defendants, and for these reasons: It would be most unreasonable that the plaintiffs be held bound to comply with the condition of a policy, to notify the company forthwith of any loss, when that company, by its own failure to comply with its contract and issue the promised policy, prevented the plaintiffs from knowing that condition. If the company would insist upon lack of complete performance in this particular, this can only be done when they make complete performance possible, or at least interpose no obstacle in the way of such performance: 56 Penn. St., *supra*.

The company cannot be allowed to say to plaintiffs: "If we had issued you a policy it would have contained a certain condition, and as you have not complied with that condition which the policy we would have issued would have contained, therefore you cannot recover." This is certainly a most remarkable defence to interpose. Besides, the defendant must be held as having waived the proofs being furnished by refusing to issue the policy and denying all responsibility: *Tayloe* v. *Ins. Co.*, 9 How. 390, and cases cited; *McComas* v. *Ins. Co.*, 56 Mo. 573; May on Ins., sects. 468–9; *Franklin Fire Ins. Co.* v. *Coates*, 14 Md. 285. It must be conceded that the formal proofs offered in evidence by plaintiffs were only evidence of the fact that they were furnished to defendant and no more: *Newmark* v. *Ins. Co.*, 30 Mo. 160. But there was other evidence in the cause showing the extent of plaintiffs' loss.

Judgment reversed and cause remanded.

NORTON and RAY, JJ., concurred. HOUGH and HENRY, JJ., dissented.

From the time when contracts of insurance were first known, it has been customary to evidence them by a policy. Upon this general custom, some early writers formulated a rule, that there could be no valid and binding insurance without a policy: 1 Duer on Ins. 60.

In America, this view was taken in a

few early cases. In *Head* v. *The Providence Ins. Co.*, 2 Cranch 166 (1804), MARSHALL, C. J., maintained that a charter which empowered a corporation to make contracts of insurance by policy, and prescribed the manner in which a policy must be executed, confined the company to that method of contracting. The question in that case was upon a verbal negotiation for the cancellation of a policy. The Chief Justice declared that a contract which could not be created except by writing, could not be otherwise cancelled.

This opinion was approved in *Cockerill* v. *The Cin. Mutual Ins. Co.*, 16 Ohio 148. The insured had forfeited his policy by a sale of his interest in the property. The company verbally agreed to waive the forfeiture if he would repurchase. This was done; but the court decided, upon the general usage and the implication of the charter, that the policy had not been legally revived.

The principle of these cases was reaffirmed by the Superior Court of New York City, in *Spitzer* v. *St. Marks Ins. Co.*, 6 Duer 6 (1856), under a misapprehension, however, as to the final decision of the New York Court of Appeals, in *The Baptist Church* v. *Brooklyn Fire Ins. Co.*, *infra*.

But judicial opinion was by no means uniform on this subject. In *Smith* v. *Odlin*, 4 Yeates 468 (1807), Chief Justice TILGHMAN refused, *obiter*, to pronounce an oral contract of insurance invalid. In *Sandford* v. *Trust Fire Ins. Co.*, 11 Paige 547 (1845), Chancellor WALWORTH admitted the possibility of an oral insurance. In *McCulloch* v. *The Eagle Ins. Co.*, 1 Pick. 278 (1822), Chief Justice PARKER said it was "certain that, if a contract was made, the mere want of a policy will not prevent plaintiff from recovering." But in this and in the foregoing case, there was no completed contract.

Finally, in *Warren* v. *Ocean Ins. Co.*, 16 Me. 439 (1840), a waiver of forfeiture, irregularly endorsed by the company's agent upon the policy, was declared binding as a parol agreement, though the usual fee had not been paid. Since then the validity of a parol insurance has been so frequently and uniformly affirmed, that it may well be pronounced the undoubted American doctrine.

The ground taken is, that at common law, a contract of insurance was not different from any other. No contract is required to be in writing unless by statute. When the agreement to insure has been made by a company, it is governed by the same rules which prevail in a transaction with an individual underwriter. By prescribing a manner of executing the policy, the charter does not exclude the oral engagement, because the contract and the policy of insurance are not identical. The leading case for this view is *The Com. Mutual Ins. Co.* v. *Union Mutual Ins. Co.*, 19 How. 318 (1856). That was an oral contract with a company organized on the mutual plan. No premium was paid, no premium-note was given, and the loss occurred before the policy could be executed. CURTIS, J., held that the liability to give a premium-note was equivalent to the actual execution and delivery of it, and that the oral contract bound the company. In the following cases parol contracts were held obligatory, notwithstanding the implication of a charter provision that policies should be binding only when signed by the president and secretary, and countersigned by the agent. In many of these cases it was admitted that a corporation could disaffirm its most solemn acts if *ultra vires*. In some instances the premium was paid, in whole or in part, by note or in cash: *Ide* v. *Phœnix Ins. Co.*, 2 Biss. 333; *Hamilton* v. *Lycoming Mutual Ins. Co.*, 5 Barr 339; *Mobile, &c., Ins. Co.* v. *McMillan*, 31 Ala. 711; *Blanchard* v. *Waite*, 28 Me. 51; *Lightbody* v. *N. A. Ins. Co.*, 23 Wend. 18; *Hartford Ins. Co.* v. *Farrish*, 73 Ill. 166; *Shaw* v. *Rep. Life Ins. Co.*, 67 Barb. 586;

Home Ins. Co. v. *Myer*, 93 Ill. 271.

In other cases no premium was paid: *New Eng., &c., Ins. Co.* v. *Robinson*, 25 Ind. 536; *Dayton Ins. Co.* v. *Kelly*, 24 Ohio St. 345; *Train* v. *Holland Purchase Ins. Co.*, 62 N. Y. 598; *Northrup* v. *Miss. Valley Ins. Co.*, 47 Mo. 435; *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw. 82; *West. Mass. Ins. Co.* v. *Duffey*, 2 Kans. 347; *Rhodes* v. *Railway Pass. Ins. Co.*, 5 Lans. 71; *Weeks* v. *Lycoming Ins. Co.*, 7 Ins. L. J. 552; *Franklin Fire Ins. Co.* v. *Taylor*, 52 Miss. 441.

The same principle is recognised in cases of life insurance: *Cooper* v. *Pacific Mutual Life Ins. Co.*, 7 Nev. 116; *Sheldon* v. *Conn. Mutual Life Ins. Co.*, 25 Conn. 207.

The parol contract is effectual, not only as an original insurance, but also as a renewal of the policy: *Post* v. *Ætna Ins. Co.*, 43 Barb. 351; and again, as an extension of the policy to cover other goods: *Kennebec Co.* v. *Augusta Ins. & Banking Co.*, 6 Gray 204. It is just as effectual to establish a retrospective insurance as a written policy: *Security Fire Ins. Co.* v. *Kentucky M. & F. Ins. Co.*, 7 Bush 81. So too a special privilege, as permission to ship goods on deck instead of in the vessel's hold, may be granted by parol, though such permission is required by the terms of the policy to be endorsed thereon: *N. W. Iron Co.* v. *Ætna Ins. Co.*, 26 Wis. 78.

Notwithstanding the very explicit opinion of CURTIS, J., in *Com. Mutual Ins. Co.* v. *Union Mutual Ins. Co.*, *supra*, later cases have apparently established an exception in this regard, when the alleged contract was with a mutual company. It seems necessary for the insured to pay the premium, deliver the premium note, and receive or sign the policy, before the contract is complete. This is so, because it is said, mutual companies could not otherwise do business. The premium notes are their sole capital, and the claim against the insured, to have him execute a note, is too dangerous and tedious a remedy. The requirements which they make of their members are conditions precedent to any insurance: *Belleville Mutual Ins. Co.* v. *Van Winkle*, 1 Beas. 333; *Schaffer* v. *Mutual Fire Ins. Co.*, 89 Penn. St. 296.

In the leading case of *The Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305 (1859), suit was brought upon an oral contract to renew from year to year, in consideration of the annual premium. Prepayment of premium was waived in same way, and loss occurred after expiration of year, and before payment of premium. One of the defences was that the agreement, because not in writing, was void by the Statute of Frauds, as by its terms not to be performed within a year from the making. The court held, that since performance was not impossible within a year, the statute did not apply. To the same effect is *Sanborn* v. *Fireman's Ins. Co.*, 16 Gray 448.

Where a statute requires written contracts of insurance to have a stamp, without anything further, an oral contract is not for that reason invalid: *Fish* v. *Cottenet*, 44 N. Y. 538.

A statute requiring all the conditions of the insurance to be inserted in the policy, simply prevents other papers being made a part of the policy by mere reference, and does not forbid a parol insurance: *Relief Fire Ins. Co.* v. *Shaw*, 4 Otto 574.

A policy is not invalid on the ground of no insurable interest in a case of loss before issuance; because the interest did exist at the time of the parol contract, and the insurance dates from that time: *City of Davenport* v. *Peoria, &c., Ins. Co.*, 17 Iowa 276; *Am. Horse Ins. Co.* v. *Patterson*, 28 Ind. 17.

Although an agent is instructed in all cases to make out policies which by their

terms are not to be obligatory until countersigned by himself, yet he may bind the company by a preliminary parol contract; and the circumstance that he has in his possession policies executed in blank by the company, is conclusive evidence that they designed him to exercise this incidental authority: *Ellis* v. *Albany, &c., Ins. Co.*, 50 N. Y. 402; *Post* v. *Ætna Ins. Co.*, 43 Barb. 351; *Angell* v. *Hartford Fire Ins. Co.*, 59 N. Y. 171. His authority may also be settled by custom: *Com. Mutual Marine Ins. Co.* v. *Union Mutual Ins. Co.*, 19 How. 318.

Of course all the elements of a perfect contract must be present; unless everything essential is ascertained, there is no insurance: *Sandford* v. *Trust, &c., Ins. Co.*, 11 Paige Ch. 547; *Hartford Ins. Co.* v. *Wilcox*, 57 Ill. 180.

It was said by Judge ROBERTSON, in *Tyler* v. *N. A. Ins. Co.*, 4 Robt. 151, that there were five essential elements in every contract of insurance, all of which must be definitely ascertained to make a valid obligation, viz., the subject-matter, the risk, the amount, the duration, and the premium. But the cases hardly justify so rigid a proposition. Frequently one of these elements, when not settled by the express contract, is supplied by implication. *Audubon* v. *Excelsior Ins. Co.*, 27 N. Y. 216, was a case of this sort. The company had at divers times insured A. upon certain papers and plates, portions of a work he was publishing, while at the binders. On sending a fresh lot to the binders, A. applied for a policy, stating risk, amount and time. A policy was promised, but no premium was settled. The court held that, since the risk did not differ in character or duration from the preceding arrangements, the same premium was to be implied. *Eames* v. *Home Ins. Co.*, 4 Otto 621, was a parol contract in which the duration of the risk was not fixed, and the court assumed that it was intended to endure for one year, according to general custom. Again, where the amount of the premium was not fixed, but by agreement was to be deducted, when settled, from moneys due insured in the hands of the company, it was held that the designation of a fund was sufficient: *Walker* v. *Met. Ins. Co.*, 56 Me. 371. In a case where the fixing of the premium was postponed till the agent could inspect the building, the verbal contract was nevertheless held complete, and the company was liable for loss before inspection: *Cooke* v. *Ætna Ins. Co.*, 7 Daly 555. When authority is given to an agent to take out a policy in some good company, the premium which the agent in his discretion may settle will bind the applicant: *Train* v. *Holland Purchase Ins. Co.*, 62 N. Y. 598. And conversely where the agent represents several companies, and it is left to his discretion where to place the risk, the exercise of this discretion by entry on his books binds the company named there, before the issuance of a policy: *Ellis* v. *Albany, &c., Ins. Co.*, 50 N. Y. 402. When the negotiation is carried on by mail, the contract is complete from the time the insured posts a letter accepting the insurer's proposition; and a check sent at that time is a prepayment of premium: *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, overruling *McCulloch* v. *Eagle Ins. Co.*, 1 Pick. 278.

Merely handing in an application subject to the approval of the company, is not equivalent to an agreement to insure. The company, where it has not unreasonably delayed its decision, may reject the application after loss. And it is not bound to return the premium at the same time, unless demand is made: *Harp* v. *Grangers, &c., Ins. Co.*, 49 Md. 307; *Alabama, &c., Ins. Co.* v. *Mayes*, 61 Ala. 163; *Barr* v. *N. A. Ins. Co.*, 61 Ind. 488. And the applicant may withdraw his proposal any time before acceptance: *Globe, &c., Ins. Co.* v. *Snell*, 19 Hun 560. But where the agent

takes the premium and declares the applicant insured upon the oral contract, but no policy is to issue till the company's special agent has inspected the building, the company has by this arrangement merely the right to terminate the contract, if upon inspection its agent disapproves the risk. In the meantime, the applicant is insured: *Putnam* v. *Home Ins. Co.*, 123 Mass. 324.

Where the policy is made out, but is not accepted and premium paid within a reasonable time, the company may consider the contract at an end: *Baxter* v. *Massasoit Ins. Co.*, 13 Allen 320.

Where the company has a rule of which the applicant has notice, that no insurance is complete until a written acceptance of the terms is filed with the company, or until premium has been paid, there is no contract till this is done: *Flint* v. *Ohio Ins. Co.*, 8 Ohio 501; *Markey* v. *The Ins. Co.*, 126 Mass. 158.

But where the agent of the company agrees to issue a policy, and tells the applicant that he may consider himself insured, the contract is complete without prepayment of premium, although the policy when issued will contain a provision that it shall not be binding until premium is paid: *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw. 82.

It has sometimes been said that there is a distinction between contracts *of* insurance and contracts *to* insure. The parol agreement is the contract *to* insure; and the executed policy is the contract *of* insurance. The distinction, however, is almost without theoretical or practical value. The elements of the contract, the rights and liabilities of the parties, are substantially the same in both instances. The oral agreement is just as much a contract of insurance as a written policy. Apparently the real *ratio decidendi*, in all the cases where this distinction has been alluded to, is that, although the charter of a company or a statute may prescribe a way in which policies are to be executed, this does not necessarily exclude oral agreements: *Commercial Ins. Co.* v. *Union, &c., Ins. Co.*, 19 How. 318; *Ins. Co.* v. *Colt*, 20 Wall. 560.

Consequently, in those states and countries, for example, Georgia, England and some of the continental countries, where by statute contracts of insurance must be in writing, neither party is bound by a verbal agreement; no recovery can be had against the company in case of loss; and the applicant may withdraw his proposal any time before receiving his policy: *Simonton* v. *Liverpool Ins. Co.*, 51 Ga. 76; *Croghan* v. *N. Y. Underwriters' Agency*, 53 Id. 109; *Clark* v. *Brand*, 62 Id. 23; *Xenos* v. *Wickham*, Law Rep., 2 H. L. 296, 314; *Warwick* v. *Slade*, 3 Camp. 127; *Parry* v. *The Great Ship Co.*, 4 B. & S. 556.

Where the policy is executed but not delivered, the contract of insurance is complete. Upon loss trover may be brought for the policy, and the full indemnity recovered: *Kolne* v. *Ins. Co. of North America*, 1 Wash. C. C. 93.

If the policy has not been executed, the insured has his election; he may proceed at law upon the parol contract, or he may bring a bill in equity for specific performance of the agreement to issue a policy. And the latter seems the better method; since equity, to prevent circuity of action, having jurisdiction of the case will determine the whole matter, and make a decree for the payment of the actual loss: *Walker* v. *Met. Ins. Co.*, 56 Me. 371; *Commercial, &c., Ins. Co.* v. *Union, &c., Ins. Co.*, 19 How. 318; *Wooddy* v. *Old Dominion Ins. Co.*, 31 Grattan 362; *N. W. Iron Co.* v. *Ætna Ins. Co.*, 26 Wis. 78; *Security Fire Ins. Co.* v. *Kenty, &c., Ins. Co.*, 7 Bush 81.

Where the ground of claim is an oral renewal, an action will lie on the policy: *Post* v. *Ætna Ins. Co.*, 43 Barb. 351.

Where the policy should, by its terms, be executed by the president and secre-

tary, and in fact is not, but is countersigned by the agent, suit should be brought on the parol agreement and not on the policy: *Peoria Ins. Co.* v. *Walser*, 22 Ind. 73.

By the law of Canada, the insured cannot sue at law directly for the amount of the loss upon a parol contract; his only remedy is in equity, or, perhaps, an action at law for the delivery of the policy: *Jones* v. *Prov. Ins. Co.*, 16 Up. Can. Q. B. 477.

If the policy when issued does not conform to the verbal agreement, there is no merger, unless under circumstances which amount to an acceptance of the policy with notice of the variance: *Humphry* v. *Hartford Fire Ins. Co.*, 15 Blatchf. 504; *Franklin Ins. Co.* v. *Hewitt*, 3 B. Mon. 231. And where the variance has occurred through the error of the company, equity will rectify the mistake and award full damages for the loss: *Home Ins. Co.* v. *Myer*, 93 Ill. 271. A court of admiralty, however, will not reform a policy of insurance. That court has no jurisdiction of the preliminary contract, but only of the perfect instrument; just as it has no jurisdiction over the contract to build a ship, though it has over the ship when built: *Andrews* v. *Essex Fire & Marine Ins. Co.*, 3 Mason 6.

DWIGHT M. LOWREY.

Supreme Court of California.

PRATT *v.* WHITTIER, ET AL.

As between the vendor and vendee, the rule for determining what is a fixture is always construed strongly against the vendor.

Chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by a grant of the freehold if the grantor has power to convey.

Parties may by express agreement fix upon chattels annexed to the realty whatever character they choose. Property which the law regards as fixtures may be by them considered as personalty, and *vice versa;* and such agreements will be enforced by the courts.

Plaintiff by deed granted to defendant the Orleans Hotel, describing it as "Lot No. 6, in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." Plaintiff reserved in his deed the right to remove from the upper rooms of the hotel his "furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." *Held*, that the plaintiff was not entitled to remove the gas fixtures, consisting of chandeliers; globes lettered "Orleans Hotel;" brackets, burners, pendants, &c.; a kitchen-range with boilers attached, the range resting on a brick foundation and with its attachments connected to the building by pipes; tanks and filters attached to the building by a system of pipes, nor mosquito-transoms and window-screens fitted to the windows and transoms of the hotel in the usual manner, as such articles were fixtures which passed by the deed to defendant as being essential for the purposes for which the building was formerly used. The plaintiff having reserved in his deed only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property," it must be presumed that the parties by their agreement considered the things in controversy as permanent fixtures and appurtenances of the hotel which were to pass by the deed.

McFarland & Edgerton, for appellant.

Freeman & Bates, for respondents.

McKEE, J.—This was an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, &c., a kitchen-range with boiler attached, a patent water-filter, tanks and mosquito-screens. The property was attached to a building known as the "Orleans Hotel," situate on a lot of land fronting on Second street, in the city of Sacramento.

As owner of the hotel, the plaintiff on October 15th 1879, contracted in writing to sell the same to the defendant, by the following description, viz.:

"Lot No. 6 in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." The sale was made for $28,000 gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the first day of November 1879, reserving to the plaintiff, among other things, the right, within ten days after delivery of possession, to remove from the upper rooms of the hotel "his furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." On the 26th of October, the defendants, having satisfied themselves about the plaintiff's title, paid the full amount of the purchase-money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale, and subject to the terms, conditions and reservations therein contained.

Within ten days after the delivery of possession plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which, being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by the deed of grant.

If the question arose out of the deed alone it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the

authorities upon the subject are conflicting. In *McKeag* v. *Hanover Fire Ins. Co.*, 81 N. Y. 38, the Supreme Court of New York held that gas pipes which run through the walls and under the floors of a house are permanent parts of the building; but fixtures attached to such pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by unscrewing them, are not appurtenances, and so do not pass by deed or under a mortgage of the premises, and the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty.

In *Guthrie* v. *Jones*, 108 Mass. 193, it was held that, as between landlord and tenant, gas fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. They are, says the court, in their nature, articles of furniture, and the fact that they were fastened to the walls for safety or convenience does not deprive them of their character as personal chattels and make them a part of the realty.

In *Vaughen* v. *Haldeman*, 33 Penn. St. 522, the court says: "Lamps, chandeliers, candlesticks, candelabras, screens and the various contrivances for lighting houses by means of candles, oil or other fluids, have never been considered as fixtures and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures. In *Jarechi* v. *Philharmonic Society*, 79 Penn. St. 403, and 21 Am. Rep. 78, the case of *Vaughen* v. *Haldeman* was reviewed and approved. Says SHARSWOOD, J.—"Houses are considered as finished by the builders when the gas fittings are completed. The fixtures are put up in more or less expensive style, according to the tastes and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied that, as between him and the landlord, they are his, and he may remove them or they may be sold as personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see then no reason for departing from the judgment in *Vaughen* v. *Haldeman*." To the same effect are *Shaw* v. *Lenke*, 1 Daly 487;

Montague v. *Dent*, 10 Rich. 138; *Rogers* v. *Crow*, 40 Mo. 91; *Lawrence* v. *Kemp*, 1 Duer 363; *Towne* v. *Fiske*, 127 Mass. 125.

On the other hand, it has been held by the Supreme Court of Kentucky, in the case of *Johnson* v. *Wiseman*, 4 Met. 357, that where a vendee of a house in possession purchased and put into it gas fixtures, chandeliers, &c., which were affixed by means of screws to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, such chandeliers, &c., became fixtures which passed by a deed of the realty, in the absence of any express provision to the contrary, although they may be removable without injury to the walls or the ceiling of the house, or to the pipes to which they are attached. The same doctrine was enunciated in *Smith* v. *Commonwealth*, 14 Bush 31, as one about which there was no question. Whatever, indeed, is accessory to a building for the more convenient use and improvement of the building is considered to pass by a deed of the premises. Thus articles placed in a mill by the owner to carry out the obvious purpose for which it was erected are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere: *Parsons* v. *Copeland*, 38 Me. 537. In a building erected as a factory, the steam works relied on to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used with it, and would pass by a conveyance of the real estate: 4 Met. 306. Apparatus for the manufacture of gas are fixtures: *Hays* v. *Doane*, 3 Stock. 84. Gas burners are of the same character. They are in no sense furniture, but are mere accessories to the building: *Keeler* v. *Keeler*, 31 N. J. Eq. 191.

What is accessory to real estate is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture and domestic convenience; and courts recognise and enforce the right of removal by a tenant of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation, does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulations upon the subject. So that chattels attached to the freehold by the owner, and contributing to

its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey, *Tourtellot* v. *Phelps*, 4 Gray 378, and after conveyance they cannot be severed by the vendor or any one else than the owner.

As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed; and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles appertaining to a building for manufacturing ashes (*Miller* v. *Plumb*, 6 Cowen 665); a cotton-gin fixed in its place (*Bratton* v. *Clawson*, 2 Strob. 478); a steam engine to drive a bark mill (*Oves* v. *Oglesby*, 7 Watts 106); kettles set in brick, in dyeing and print works (*Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 N. H. 207); iron stoves fixed to the brick work of chimneys (*Goddard* v. *Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour mill and attached to it (*Sands* v. *Pfeiffer*, 10 Cal. 259); a steam-engine and boiler fastened to a frame of timber, and bedded in a quartz ledge, and used for the purpose of working the ledge (*Merritt* v. *Judd*, 14 Cal. 59); a conduit of water-pipe to conduct water to a house (*Philbrick* v. *Emry*, 97 Mass. 134); hop-poles in use on a hop-farm (*Bishop* v. *Bishop*, 11 N. Y. 123); statues erected for ornament, though only kept in place by their own weight (*Snedeker* v. *Warring*, 2 Kern. 170). In fact, whatever the vendor has annexed to a building, for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, say the Supreme Court of Virginia, seems to be this: That when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either: *Green* v. *Phillips*, 26 Gratt. 752; *Shelton* v. *Ficklin*, 32 Id. 735.

Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they

were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered "Orleans Hotel," and that they, with the chandeliers, &c, were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building and connected with a sewer in an alley outside, and that the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were as necessary to the hotel as its windows, its blinds and shutters. All of the articles were therefore essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, "it would not have been a hotel without them." They were, therefore, fixtures which passed by the deed of grant to the defendant, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions and reservations therein contained and expressed.

As already stated, the agreement reserved only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property." In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel which were to pass by the deed. It is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their

agreement, courts will enforce it: *Smith* v. *Waggoner*, 50 Wis. 155; 97 Mass. 279; 20 N. Y. 344; 53 Id. 377; 24 Wend. 359; 1 Hill 176; 52 N. Y. 146.

So that the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them, by any possibility of construction, could fall within the reservation of "furniture, carpets or pictures in the upper rooms of the hotel."

The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.

Judgment and order affirmed.

As between landlord and tenant gas fixtures, so called, consisting of gas chandeliers, burners, &c., screwed upon the gas pipe in the usual way, have always been considered as the property of the tenant and removable by him. See *Lawrence* v. *Kemp*, 1 Duer 363; *Ex parte Morrow*, 1 Lowell's Dec. 386; s. c., 2 N. B. R. (2d ed.) 665; *Guthrie* v. *Jones*, 108 Mass. 191; *Seeger* v. *Pettit*, 77 Penn. St. 437; *Hays* v *Doane*, 11 N. J. Eq. 84.

As between vendor and vendee, and mortgagor and mortgagee, the weight of authority in the United States seems to be, as stated in the principal case, that where the question is not affected by the terms of the contract between the parties, they are regarded as furniture and do not pass with the land; *Montague* v. *Dent*, 10 Rich. Law 135, where it was so held as between the purchaser at a mortgage sale and an execution creditor. *Vaughen* v. *Haldeman*, 33 Penn. St. 522; *Jarechi* v. *Philharmonic Society*, 79 Penn. St. 403; *Rogers* v. *Crow*, 40 Mo. 91; *Shaw* v. *Lenke*, 1 Daly 487; *McKeage* v. *Hanover F. Ins. Co.*, 81 N. Y. 38: *Towne* v. *Fiske*, 127 Mass. 125; see, also, *Lawrence* v. *Kemp*, 1 Duer 363; *Steuar* v. *Douglas*, 1870, Brown's Fixt., Appendix A.; *Funk* v. *Brigaldi*, 4 Daly 359. See, however, *contra*, *Johnson* v. *Wiseman*, 4 Met. (Ky.) 357; *Sewell* v. *Angerstein*, 18 L. T. (N. S.) 300, at Nisi Prius per WILLES, J., the judges of the Court of C. P. agreeing with him; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr, 71; *Smith* v. *Commonwealth*, 14 Bush 31; see, also, *Ex parte Morrow*, 1 Low. Dec. 386; s. c. 2 N. B. R. (2d ed.) 665. In *Ex parte Acton*, and *Ex parte Wilson*, *supra*, the gas burners were accessory to a mill and the cases may probably be distinguished on that account.

Gas fittings (*i. e.* the pipes to which the gas fixtures are attached) as distinguished from gas fixtures, do, however, pass with the land where there is nothing in the deed to indicate a contrary intention. *Ackroyd* v. *Mitchell*, 3 L. T. (N. S.) 236; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr 61; *McKeag* v. *Hanover F. Ins. Co.* 81 N. Y. 38. So, also, as it seems, is to gasometers and apparatus

for generating gas; *Hays* v. *Doane*, 11 N. J. Eq. 96.

Gas fixtures may also pass with the land, where it is apparent from the deed that such was the intention of the parties, and this appears to be the real ground of the decision in the principal case; and upon this ground the decision seems correct.

The kitchen range and boilers, and the tanks and filters, would seem clearly to come within the same rule applied to the gas fixtures. Stoves set up in the usual way are, however, in the absence of terms in the deed affecting the question, generally considered as furniture, and hence do not pass with the land; *Williams* v. *Bailey*, Sup. Ct. Mass., Essex, April 1801, 3 Dane's Abr. 152, sect. 25; *Freeland* v. *Southworth*, 24 Wend. 191: *Harris* v. *Haynes*, 34 Vt. 220; see, also, *Tuttle* v. *Robinson*, 33 N. H. 104. See, however, v. *Chuse*, 7 Mass. 432; *Smith* v. *Heiskell*, 1 Cranch C. C. 99; *Blethen* v. *Towle*, 19 Me. 252. See, also, *Folsom* v. *Moore*, Id. 252; *Tuttle* v. *Robinson*, *supra*. In the above cases, the stoves held to pass with the land were probably more or less securely annexed to the house.

As to hot-air furnaces, there is some conflict among the authorities. In *Towne* v. *Fiske*, 127 Mass. 125, a portable hot-air furnace, resting by its own weight upon the ground, put into a house by a person rightfully in possession under an agreement for a deed (in which case the same rule prevails, as between grantor and grantee: *McLaughlin* v. *Nash*, 14 Allen 136; *Hemenway* v. *Cutter*, 51 Me. 407; *Ogden* v. *Stock*, 34 Ill. 522; *Christian* v. *Dripps*, 28 Penn. St. 271; *Perkins* v. *Swanke*, 43 Miss. 349; Ewell on Fixt. 272), was held not to become a part of the realty, although connected with the house by a cold-air box, and hot-air pipes and registers in the usual manner.

On the other hand in *Stockwell* v. *Campbell*, 39 Conn. 362, a portable hot-air furnace, placed by the owner of the freehold in a pit prepared for it in the cellar of the house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, all capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar, adapted to its size and depth, were held to be a part of the realty, rendering the whole house subject to a mechanic's lien, for the value thereof and the labor of setting them in the house. In *Main* v. *Schwarzwaelder*, 4 E. D. Smith 273, the hot-air furnace which was held to pass with the house, was so connected with the house by the owner, that to remove it, it would be necessary to take down brick-work adjoining it, and its removal would probably cause the ceiling to fall. Where the connection between a furnace put into a house by the owner of the house, is so intimate as in this case, or, as in *Stockwell* v. *Campbell*, it is so annexed as to appear to have been intended as a permanent annexation to the house, the better opinion would seem to be that it should be regarded as passing with the house, and not as furniture or mere personal property. In point of fact, such furnaces are believed to be generally considered as permanent accessions to the houses containing them, and not to be subject to removal as are ordinary stoves; and hence the case of *Towne* v. *Fiske* would seem open to criticism upon this point.

As to the screen windows and transoms there would seem to be no doubt as to the correctness of the decision in the principal case; and those articles would doubtless have been considered as fixtures passing with the house in the absence of words in the deed affecting the question. Having been made for, fitted to, and used with the house, they would seem to be as much a part of the house

as ordinary doors or windows. See *Pettengill* v. *Evans*, 5 N. H. 54; *Wistow's Case*, 14 H. 8 25, pl. 6; *Liford's Case*, 14 Vin. Abr. 3193; 11 Co. 85; Shep. Touch. 90; *State* v. *Elliot*, 11 N. H. 540; *Johnston* v. *Dobie*, Mor. Dict. 5443. Where, however, double windows or blinds have never been actually or constructively annexed to the house, which is complete without them, they will not pass by the conveyance of the house, though they may be secreted in the house: *Peck* v. *Batchelder*, 40 Vt. 233.

On the whole the decision in the principal case seems satisfactory, and in accordance with established principles.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Tennessee.

W. H. CHERRY *v.* JOHN P. FROST ET AL.

An assignment for value, in due course of trade, of a certificate in a corporation with a blank power of attorney to transfer the stock in the books of the company passes the whole title legal and equitable.

If the pledgee of a certificate of stock so assigned as collateral security, sub-pledges the certificate for money loaned to him in ignorance of the owner's equity, the sub-pledgee will be entitled to hold the stock, as against the owner, to the extent of the consideration. Where a note is given for money borrowed at the time, secured by stock pledged as collateral, and the note is renewed at maturity, upon an extension of time, and the new note secured by a pledge of the same, or other stocks assigned with power of attorney to transfer, the payee who receives them without notice of any outstanding equity, takes them in due course of trade free from such equity.

If the holders of a note, secured by stock as collaterals, after the contract has been closed, exchange any of the collaterals with the makers of the notes for other stocks of equal value, he would take the latter as security for a pre-existing debt, but would be a purchaser of them to the extent of the consideration given in exchange.

At the time a certificate of stock was wrongfully sub-pledged, only a part of the stock was paid up, the corporation then holding the note of the stockholder for the residue payable on call, and the stockholders afterwards made a payment on the stock, and gave a negotiable note on the residue, *Held*, that the sub-pledgee could only claim, as against the owner, the proportion of the stock paid up at the time he received the certificate.

IN November 1871, the complainant Cherry borrowed from the City Bank of Memphis $1000, for which he gave his note, due on demand, and at the same time deposited with the bank, as collateral security, a certificate of forty shares, of $100 each, of the capital stock of the Mississippi Valley Insurance Company. The certificate was, by its face, "transferable in person or by attorney on surrender of this certificate." On the back of the certificate was an assignment for value and the printed form of a power of attor-

ney to make the transfer on the books of the company, left blank as to the name of the attorney and signed by complainant.

In June 1872, complainant executed to the City Bank of Memphis his note, at ninety days, for $1000, another sum of money that day borrowed by him, and to secure its payment delivered to the bank, as collateral security, with a similar endorsement and blank power of attorney as above, a certificate of thirty shares, of $100 each, in the capital stock of the Merchants' National Bank. The certificate was in the form of the certificate as above.

In July 1872, the City Bank suspended payments, and proved to be utterly insolvent. Upon inquiry the complainant learned that the certificates of stock, deposited as collateral security for the payment of his notes, were claimed by defendant Frost, as having been pledged to him to secure money borrowed from him by the City Bank. Complainant offered to pay the amount of his two notes upon surrender of his certificates, which offer was refused by the defendant Frost. Complainant, then, on the 1st of August 1872, notified the Mississippi Valley Insurance Company and the Merchants' National Bank not to assign the stock on their books, no assignment having yet been made under the power, and on the 9th of August 1872, he commenced this suit to enjoin the transferree and to assert his rights.

The answer of Frost was that, in May 1872, he loaned to the City Bank $12,000, for which the bank executed to him two notes of that date, one for $4000, at sixty days, and the other for $8000, at ninety days, and at the same time delivered to him various collaterals, and among others the two certificates deposited by the complainant with the City Bank to secure his notes as above; that defendant received these collaterals under these circumstances, without any notice of the complainant's equity, and under the full belief that they were the property of the bank; that the collaterals received from the bank were insufficient to pay the debt of the bank to him.

On final hearing the chancellor dismissed the bill, whereupon complainant appealed

The opinion of the court was delivered by

COOPER, J.—The complainant insists that the defendant is not a *bona fide* purchaser for value and without notice. He bases his contention first, on the character of the transaction between the

defendant and the bank, and secondly, upon the character of the certificate. It does satisfactorily appear that no money was actually loaned by the defendant to the bank on the 10th of May 1872. About $3000 of the consideration of the notes of the bank executed on this day had been loaned by the defendant to the bank May 17th 1871. On January 10th 1872 a new note was given by the bank for the amount at four months. On the same day the bank borrowed from Frost the additional sum of $5000, giving its note therefor, at four months. On 20th of February 1872, the bank borrowed from Frost the additional sum of $4000, and gave its note therefor. On the 10th of May 1872, these notes were renewed by the two notes for $8000 and $4000, for the security of which the defendants claim that the collaterals in controversy were given.

It is first insisted by the complainant, upon this state of facts, that even if it be conceded that certificates of stock are of that character of security which pass to a *bona fide* purchaser for value, free from the equities of third persons, the defendants only received these certificates as security for a pre-existing debt, and not for a consideration passing at the time. The defendant undertakes to meet this argument by saying in his answer and deposition that each of these transactions was a new one, the previous note paid and the new note or notes therefore existing for the new consideration passing. The deposition of the president of the bank, with whom the transaction was made, is not taken, and perhaps in the absence of any positive testimony to the contrary, the defendant's testimony must be allowed to prevail. The substance of what was done, however, whether the form of passing and repassing checks was actually adopted or not, was a new transaction. A note taken up by a note given to renew it is, in general, extinguished: *Hill* v. *Bostick*, 10 Yerg. 410. A person who gives his money, goods or credit for a note at the time of receiving it, or who then, on account of it, sustained loss or incurred liability, is a holder in the due course of commercial transactions: *Kinbro* v. *Lytle*, 10 Yerg. 417. And the fact that a security has been transferred, under such circumstances, in fraud of a third person, will not affect the holder's right, if entitled to the character of a *bona fide* holder in due course of trade: *Nichol* v. *Bate*, 10 Yerg. 429. The defendant, at each renewal by the bank of its notes, parted with the previous note, which was extin-

guished; and received the new note upon the extension of the time of payment with the same or other collaterals. It is not like the receipt of collaterals upon an old note which continues to exist, and is not based on the consideration of the collaterals. In the one case the collaterals may be surrendered to the rightful owner, leaving the debt and the consideration of the debt unaffected. In the other case, the collaterals cannot be taken without depriving the creditor of a part of the consideration of his contract. It is to the former class of cases that the rule invoked by the complainant applies, not to the latter: *Craighead* v. *Wells*, 8 Baxt. 38.

It is next insisted in this connection that the certificate of stock in the Merchants' Bank was not received by the defendant on the 10th of May 1872, because this certificate was not deposited by the complainant with the bank until the 19th of June 1872, when he executed his second note for $1000.

The weight of testimony is in favor of the complainant on this contention. The complainant swears positively to the fact that he did give the certificate at that time as collateral security for the note then executed. The defendant, while certain of the receipt of the other certificate on the 10th of May 1872, and probably before that time, is not sure as to the other.

He concedes, moreover, that he was in the habit of sometimes exchanging with the bank securities received by him as collaterals for securities of equal value.

There is very little doubt that the certificate in question was thus received, and not on the 10th of May 1872, when the notes of the bank were executed. The certificate, in that view, would be received as security for a pre-existing debt, but for a consideration then passing, namely, the surrender of other securities of equal value. The party would be a purchaser to the extent of this consideration. The question would, therefore, be whether the person who buys from another a certificate of stock, transferred with a blank power of attorney, is entitled to hold that stock as against the true owner. This leads us to the second branch of the case—the character of a certificate so endorsed and the right of a *bona fide* purchaser for value.

Stock in a corporation, in the sense of the interest of the stockholders, is a species of incorporeal personal property in the nature of a chose in action. A certificate of stock is only written evi-

dence of the ownership of the shares of stock named therein, and is not negotiable. Although, by the by-laws of a corporation, shares of the stock may only be transferable upon the books of the company, an equitable right in them may be acquired by a delivery of the certificate, or by a written assignment or contract, which will be good between the parties, and may be perfected as against the corporation and third parties by notice of the assignment or contract. The effect of a delivery of the certificate with an assignment and a blank power of attorney on the back thereof has been a mooted point. It came before this court in *Cornick* v. *Richards*, 3 Lea 1, where the contest was between the holder of a certificate so assigned as collateral security and other creditors of the assignor. Two of the judges, McFARLAND and COOPER, were of opinion that a complete legal title to stock could only be acquired by a transfer on the books of the company; that an assignment of a certificate of stock with a blank power of attorney to make the transfer on the books did not give a complete legal title, but only an equity, good between the parties, and which might be made good against the corporation and against the creditors and assignees of the assignor by notice to the corporation. The other three judges held that the assignment of the certificate with a blank power of attorney signed by the assignor, either by way of sale or as collateral security, would pass the title to the assignee as against the creditors of the assignor without any transfer upon the books of the company or notice to the corporation. The decision did not go any further, for it was not demanded by the facts of the case. And Judge FREEMAN, in delivering the opinion of the majority of the court, said: "It is proper to add that, as a matter of course, we do not hold these certificates negotiable, or that any of the incidents of such character goes with them by the assignment, so that the assignee must take, subject to previous equities, as any other assignee standing in the shoes of the assignor."

The case now before us raises the very question suggested in the latter clause of the sentence quoted. A pledgee of stock has clearly no right, either by absolute sale or sub-pledge, to convey any greater interest than he himself has in the stock pledged: *Talty* v. *Freedmen's Saving & Trust Co.*, 93 U. S. 321. The equity of the pledgor is to redeem his stock by the payment of the debt secured, and that equity would prevail against the equity of any assignee standing in the shoes of the assignor.

The question is therefore squarely raised in this case whether a sub-pledgee of a certificate of stock transferred with a blank power of attorney can occupy a better position than his pledgor. In the view taken by the minority of the court in *Cornick* v. *Richards*, and still entertained by them, the assignment of the certificate in that form only passed the equitable title, and any subsequent assignee would, under well-settled law, take subject to the prior equity. In the view of the majority of the court, such an assignment passed the legal title, and, logically, the subsequent assignee would also have the legal title, which, coupled with the equity arising from the consideration of the sale or pledge, would prevail over the prior equity.

The weight of authority in those states which have adopted the rule that the assignment of a certificate of stock with a blank power of attorney to transfer passes the whole title, legal and equitable, undoubtedly is that a sub-assignee, by sale or pledge, may acquire a better right than his assignor. The reason is that the owner has passed the legal title with an unlimited power of disposition, and cannot set up an unknown equity against a title acquired thereunder in good faith for a valuable consideration and in due course of trade. It is conceded that the delivery of a chattel or chose to another in pledge is insufficient to preclude the real owner from asserting his own rights in case of an unauthorized disposition of it by the pledgee; but, it is said, "if the owner intrusts to another not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of unconditional power of disposition over it, the case is vastly different:" *McNeil* v. *Tenth National Bank*, 46 N. Y. 325. The owner is estopped to dispute the title which he has apparently conferred: *Wood* v. *Smith*, 37 Leg. Int. 315; *Cushman* v. *Thayer Man. Co.*, 76 N. Y. 365; *Prall* v. *Tilt*, 28 N. J. Eq. 483. And the owner may always prevent this result by specifying in his transfer that it is made as collateral security. Upon a reconsideration of the question, the majority of the court adopt these conclusions as the necessary result of the principle settled in *Cornick* v. *Richards*, and consider the suggestion in the opinion in that case, that the assignee must take subject to previous equities, as an inadvertent *dictum*. The defendant Frost is therefore entitled to hold the stock in controversy for the satisfaction of his debt.

But the proof shows that on the 10th of May 1872, when the

defendant took the Mississippi Valley Insurance Company's certificates of stock, the complainant had paid only forty per cent. of the stock, and the defendant is only a purchaser in due course of trade to the extent of its then value. The subsequent payment on and change of the form of complainant's stock into a negotiable note still unpaid, no matter what may have been the intention with which the change was made, would not increase the defendant's interest.

With this modification, the decree below will be affirmed.

It is proposed to consider some of the questions arising out of the second branch of the above case, namely, the character of a certificate of stock, accompanied by a bill of sale and power, in the hands of a bona fide purchaser for value, the stock remaining untransferred upon the books of the company.

The first point worthy of attention, is the nature of the title of a bona fide purchaser of stock while that stock remains in the vendor's name upon the books of the corporation.

This is a question of great practical moment, when it is remembered that a vast quantity of stock passes from hand to hand daily, without any book transfer —a single illustration will suffice. Soon after the Reading Railroad suspended payments in May 1880, it was suggested in the newspapers, that the charter of the company imposed an individual liability upon all the shareholders for the debts of the corporation. Speculation in the stock was carried on to an enormous extent, but the actual transfers upon the books were few. The vendees pocketed their certificates and powers, and awaited developments.

There is a wide divergence of opinion upon this subject in the different States.

In *Fisher* v. *Essex Bank*, 5 Gray 381, SHAW, C. J., said: "The clause itself is too clear to admit of doubt, 'shall be transferable only' that is, capable of being transferred, the largest and broadest term to express alienation on one part, and requisition on the other and the word 'only' carries an implication as strong as negative words could make it, that it is in no other mode. It was not to prescribe one mode, leaving others unaffected, it made that mode exclusive."

Williams v. *Mechanics' Bank of New Haven*, 5 Blatch. 59, went further, and declared that transferable at the bank means transferable only at the bank.

The Massachusetts rule seems to have been followed in Connecticut: *Dutton* v. *Connecticut Bank*, 13 Conn. 493; *Shipman* v. *Ætna Ins. Co.*, 29 Conn. 245; and in Vermont: *Sabin* v. *Bank of Woodstock*, 21 Verm. 362. In California the rule is based on statutory regulation, and it has been several times decided, that under section 12 of Act of April 22d 1850, no transfer of stock is good against third parties, unless the transfer be made upon the books of the company. *Weston* v. *Bear River & Auburn Water and Mining Co.*, 5 Cal. 186; *Strout* v. *Natoma Water and Mining Co.*, 9 Id. 78: *Naglee* v. *Pacific Wharf Co.*, 20 Id. 529.

There is, however, a very strong current of opinion the other way. In Pennsylvania as early as *United States* v. *Vaughan*, 3 Binney 394, it was held, that stock assigned bona fide for full value on the certificate, and handed over to the vendee with a power to transfer, conveyed such an interest that the stock was not liable afterwards to attachment as the property of the vendor, although the transfer was not made upon the books of the bank at the time of the attachment.

To the same effect is *Commonwealth* v. *Watmough*, 6 Wharton 138. These were both cases of sales of stock, where the vendee had neglected to have a book transfer made.

Finney's Appeal, 9 P. F. Smith 398 was the case of a pledge, and the same rule prevailed.

These decisions were all in cases where the contest lay between creditors. In *Union Bank* v. *Laird*, 2 Wheaton 390, it was laid down that no person could acquire a legal title to stock, except under a regular transfer, according to the rules of the corporation, and if any person takes an equitable assignment it must be subject to the rights of the corporation, under the acts of incorporation, of which he is bound to take notice. To the same effect is *Bank of Commerce's Appeal*, 23 P. F. Smith 59, which was a peculiar case. The members of a building association were entitled to a loan on each share; one member pledged his certificate of stock to the Bank of Commerce, as collateral for a loan, with power of attorney to transfer. He then borrowed from the building association the full amount to which he was entitled, and transferred his stock, the bank still holding the certificate. The stock was not transferred to the bank on the books of the association. The association expired and the assets were distributed among the stockholders, as shown by their books, including the association, without notice from the bank. A contest between the association and the bank was decided in favor of the former, AGNEW, J., remarking that "the assignment of the certificate is only an equitable transfer of the stock, and to be made available must be produced to the corporation, and a transfer demanded—as between adverse claimants of the certificate, the possession of it with the transfer on it, is often the test of the title, but when the corporation itself is not dealing with its stockholders on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder, should produce the evidence of his title and ask to be permitted to participate."

The New York law, as laid down in the familiar *New Haven Railroad cases*, 34 N. Y. 30, seems to be, that the purchaser who receives a certificate with power of attorney, gets the entire title legal and equitable, as between himself and the seller, with all the rights the latter possessed, but as between himself and the corporation, he acquires only an equitable title which they are bound to recognise and permit to be ripened into a legal title, when he presents himself (before any effective transfer has been made on the books), to do the acts required by the charter or by-laws, in order to make a transfer. Until those acts are done, he is not a stockholder and has no claim to act as such, but possesses as between himself and the corporation, by virtue of the certificate and power, the right to make himself or whomsoever he chooses, a stockholder by the prescribed transfer.

The contention thereof, that until a book transfer has taken place, the holder of the stock has but an equitable title, is both true and untrue. It is true as against the company itself. If its rules for example prescribe that no transfer shall be allowed if the transferor be indebted to the company, then the title of the transferee, legal as against the rest of the world, is but equitable as against the company. But it is untrue as to all other parties. *New York & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 80; *Bank* v. *Kortright*, 22 Wendell 348; *Rogers* v. *Stevens*, 4 Halst. Ch. 167; *Broadway Bank* v. *McElrath*, 2 Beasley 24; *Hunterdon* v. *Nassau Bank*, 2 C. E. Green 496; *Railroad Co.* v. *Thomason*, 40 Geo. 411.

It is thus observed, that the decisions in the different states present a diversity

of opinion, upon the question in hand. But it would seem that those of Pennsylvania, New York, and New Jersey, rest upon a more substantial foundation, and for these reasons: the argument in favor of a book transfer being the only valid one as against third parties, and more especially creditors, has been that the same rule which is requisite to make a transfer of ordinary goods and chattels valid against execution creditors, ought to be observed and applied as far as practicable in the transfer of stock; that to render a transfer of goods valid against the claims of creditors of the vendor, a transmutation of possession must accompany the transfer, but as this is not altogether practicable in the case of stock, on account of its not being susceptible of manual occupation, yet if it will admit of anything being done which can fairly be considered equivalent to an actual change in possession of goods, it ought to be done, otherwise the sale ought to be held invalid, at least as against creditors of the vendor; that a book transfer would seem to be the only thing that could be deemed in such a case an equivalent to the vendee's taking actual possession in the case of goods, and therefore unless done the transfer ought not to avail against creditors.

This was substantially the argument brought forward in *Commonwealth* v. *Watmough*, *supra*, but it was well met by Mr. Justice KENNEDY, who said that although the legislature had made such stock subject to execution, yet the nature of it has not been thereby changed, so as to have become similar to goods and chattels. For the debts of the *real* owners it is made liable to be taken in execution; but as to what constitutes the ownership in it, or the nature of the evidence by which it may be established, are in no wise changed. Stock is from its very nature incapable of such possession as to make it known or notorious who has the use or benefit of it; even its existence may be known but to comparatively a few persons.

The only evidence of it that can be safely trusted as to this, is the books of the corporation, but they being of a private nature are not open to public inspection. Hence it is that the ownership, though held by the owner in his own name on the books, "is not supposed to have given him a general credit with the world." The great object of requiring transfers to be made in this manner is to prevent all difficulty that otherwise might arise with the authorities of the corporation, to know who its corporators are, who are entitled to vote at elections, receive dividends," &c.

But a second and by far the most important question remains to be considered, viz., the position of the subpledgee in the principal case, the pledgee without notice, of a non-negotiable security. It is horn-book law that the assignee of a non-negotiable security takes the same subject to all the equities existing against the assignor. At common law a pawnee might sell, assign or pledge his interest in the pawn. But should the pawnee undertake to pledge the property, not being negotiable securities, for a debt beyond his own, he would be guilty of a breach of trust, and would acquire no title beyond that held by the pawnee: Story on Bailments, sec. 324. This statement is rested by Story upon a Massachusetts case, and some very early English cases. The former, however, hardly seems authority for such a conclusion, because it was decided solely upon the ground that certain pledged securities were negotiable, which, of course, altered the whole question, while the latter has been said, "rather to justify the liberty to repledge on the inference drawn by and stated in the reporter's marginal note, than to lay it down as a proposition already established by authority:" Tyler on Usury 567. The question was finally settled in England by the two recent cases of *Donald* v. *Suckling*, Law Rep., 1 Q. B. 585, and *Halliday* v. *Holgate*, Id., 3 Exch. 299. In Pennsylvania, as early

as *Thompson* v. *Patrick*, 4 Watts 414, the right of the pledgee to re-pledge to the extent of his interest was established, but in 1878, an act was passed by the legislature of that state (Purd. 2107) prohibiting under penalty of heavy fine and imprisonment, the repledging of any stock, bonds or other securities, without the consent of the pledgor. This statute was hastily drawn and carelessly expressed. It aimed to cure an evil, and ended by making the remedy worse than the disease. It was violated, and necessarily violated, every day in a thousand cases, and rendered any broker liable to a heavy fine and several years in the penitentiary, at the instance of any spiteful or vindictive customer, for doing what had long been recognised as perfectly valid by the common law of Pennsylvania. Accordingly, at the last session of the legislature, the following proviso was added, viz., "That this act shall not be construed to prevent brokers from pledging or hypothecating stock or other securities, which they have purchased, in whole or in part, with their own money or credit for others, and for which they have not been wholly reimbursed by the parties for whom such stocks or other securities have been purchased:" Act June 10th 1881, Pamph. L. 107.

The contention in the principal case does not, as will be observed, arise as to the legality of the sub-pledge, but from the claim of the sub-pledgee to the ownership purged from all equities existing against his assignor. The leading New York case of *McNeil* v. *Tenth National Bank* is a good illustration of the question in hand. Plaintiff kept an account with a firm of stock brokers in New York, relating to certain stocks which they had purchased and were carrying for him. For the purpose of securing any balance that might become due them, the plaintiff delivered to them a certificate for a number of shares in the stock of the St. Johnsville Bank, with the usual blank assignment and power. The stock brokers pledged this to another firm, who in turn pledged it to the defendant. All this was without plaintiff's knowledge. He was indebted to them on the account for which the shares were pledged to them in a very small amount, but no account had been rendered nor any demand made. The court held the defendants entitled to hold the stock. In a recent Pennsylvania case the court went a step further. One of four executors put into a broker's hands stock of his decedent's estate, with a bill of sale and power annexed, signed "A. B., Acting Executor," as collateral security for a personal indebtedness; the broker, who knew of the fraud, pledged the stock to defendant, who advanced money to him thereon in good faith. The defendant's title was pronounced unimpeachable: *Wood* v. *Smith*, 37 Leg. Int. 315. *Mt. Holly Turnpike Co.* v. *Ferree*, 2 C. E. Green 117; *Prall* v. *Tilt*, 28 N. J. Eq. 479; *Moore* v. *Metrop. Nat. Bank*, 55 N. Y. 46; *Penna. Railroad Co.'s Appeal*, 5 W. N. C. 22; *Wallace* v. *Boyd*, 10 Id. 256.

It may be asked then, are not certificates of stock negotiable? By no means. An examination of the cases will show that the decisions rest solely upon the ground of estoppel. There can be no doubt that simply intrusting to another possession of a chattel will not protect a purchaser from the bailee, however *bona fide*. As was said by Mr. Justice WOODWARD in *Quinn* v. *Davis*, 28 P. F. Smith 18, "The owner of a chattel cannot, apart from legal process, be divested of his title to it, except as a consequence of some unlawful or improvident act of his own. The transfer of possession to another without more is not such an act."

"But," as was said in *McNeil* v. *Tenth National Bank*, *supra*, "if the owner intrusts to another not merely the possession of the property, but also the written evidence over his own signature